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THE NEW MEMBERS OF THE EDITORIAL COMMITTEE

Prof. S. Venkataraman and Sri S. V Venugopalachari have agreed to serve on our Editorial Committee. We welcome them with genuine pleasure. Neither of them is a stranger to our readers Both have been law teachers and lawyers. Prof. Venkataraman has won distinction as a Professor of law. He was the Editor of this Journal from 1940 to 1945 He took charge at a crucial time in its history and imparted considerable vitality to it He served as Editor till his acceptance of full-time appointment as Principal, Law College at the Andhra University. He was also editing the Federal Law Journal which became subsequently the Supreme Court Journal He has been contributing regularly, over the years, to the columns of this Journal, scholarly and informative articles on a variety of subjects Sri Venugopalachariar's association with our Journal has been long-standing and goes back to more than 30 years He has been a Reporter Calm and serene, he is capable of reaching balanced judgments, and he has gathered a large experience as Advocate Our grateful thanks are due to both Prof S Venkataraman and Sri S V. Venugopalachari for accepting our invitation to serve on the Editorial Committee.

JUSTICE SUBBA RAO'S APPOINTMENT AS CHIEF JUSTICE OF INDIA

The appointment of Justice Subba Rao as Chief Justice of India with effect from 30th June is particularly welcome. For Justice Subba Rao has his roots in Madras and his judicial baptism was in the Madras High Court An Indian lawyer can look forward to no higher distinction than being invited to serve as the Chief Justice of India That great distinction has now come to Justice Subba Rao in the order of things. He was in the front ranks of the Bar when he became a Judge of the Madras High Court in 1948 at a comparatively early age He had handled and argued a large number of cases and gathered experience in the different branches of the law. With the formation of the Andhra High Court, in 1954, he became its Chief Justice. On the integration of Andhra and Telengana areas and the constitution of the State of Andhra Pradesh he took over the administration of the Judiciary as its first Chief Justice Among the most important and pressing problems he had to tackle were the problem of bringing about a fusion and merger of the Andhra and Telengana sections of the Bench and the Bar irrespective of their historical background and the problem of accumulation of arrears in the High Court He succeeded remarkably well in both

tasks and impressed every one not merely with his merit and learning but also with his administrative efficiency in organising with understanding and practical wisdom the Andhra Pradesh High Court within a short time and running it on sound lines When therefore at the end of January, 1958 he was made a Judge of the Supreme Court it was in the fitness of things and gave great satisfaction all round.

Though his judicial work can be assessed with propriety only after his retirement this much may be said even at this stage. Justice Subba Rao has served the cause of justice untrammelled by any predilections following always the light of his own mind without any pre-conceived or *a priori* theory of justice He has held the scales even as between the State and the subject, the landlord and the tenant, the creditor and the debtor and brought to bear on the cases coming before him an objective outlook uninfluenced by extraneous considerations.

In the Supreme Court he has never hesitated to express his own viewpoints though often opposed to those of his colleagues. In fact his dissenting judgments are many and imposing His expositions have been lucid and logical revealing his individuality and are free from unnecessary embellishments and not swayed by sentimentalism or popular prejudice He has delivered a number of important judgments on constitutional and other questions *Gherulal Parakh's case*[1] on wagering contracts, *M S. M Sharma's case*[2] on Freedom of the Press and Parliamentary privilege, *Nanavati's case*[3] on Procedure when the Sessions Judge disagrees with the verdict of the jury etc , *Varadarajan's case*[4] on kidnapping, *Lachman's case*[5] on desertion by a spouse are some of his noteworthy decisions. In his approach to constitutional questions, Justice Subba Rao has endeavoured to keep in view the fact that "a fundamental right is transcendental in nature and it controls both the legislative and executive acts" (*Thomas Dana's case*[6], and that "fundamental rights cannot be made to depend solely upon the presumed fairness and ingruity of officers of State" (*Kishen Chand Arora's case*[7]).

Justice Subba Rao's tenure of office as Chief Justice will be for about a year and a half. Though it is a comparatively short period only, we are sure that the impact of his personality will be felt within that time in the sphere of administration of justice. We offer him our respectful and cordial felicitations.

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1 (1959) S C J 878 (1959) 2 M L J (S C) 81 (1959) 2 An W R. (S C) 81

2 (1959) 2 M L J (S C) 125 (1959) 2 An W R (S C) 125 (1959) M L J (Crl) 666 : (1959) S C J 925

3 (1962) 2 S C J 347 1962 M L J (Crl) 531

4 (1965) 2 M L J (S C) 40 (1965) 2 An W R (S C) 40 (1965) 2 S C J 493 (1965) M L J (Crl) 640

5 A I R 1964 S C 40

6 (1959) M L J (Crl) 474 (1959) S C J 699 at 715

7. (1961) 2 S C J 309 at 322 (1961) M L J (Crl) 541.

RETIREMENT OF SRI P. CHANDRA REDDY, C J.

In the retirement of Sri P. Chandra Reddy, Chief Justice, an experienced Judge and a genial and affable personality will be lost to the Madras High Court. While at the Madras Bar, Sri Chandra Reddy had equipped himself with a sound knowledge of legal principles and a correct method of analysing facts and evidence and presenting them cogently and effectively He had a large volume of practice and had become familiar with the different branches of the law Though appointed at a fairly young age as a Judge of the Madras High Court he could fill the position with ease. With the formation of the Andhra State he became one of the Judges of that High Court, and when in January 1958 Subba Rao, C J., became a Judge of the Supreme Court, Justice Chandra Reddy became Chief Justice of the Andhra Pradesh High Court in succession to him. Towards the latter part of 1964 he became the Chief Justice of the Madras High Court. But the very next day after taking the oath of office as Chief Justice he was called upon to act as Governor of the State and in fact he has had to do so thrice, so much so, he has in effect functioned as Chief Justice of the Madras High Court for a short period only. His work as a Judge was characterised by thoroughness and methodical approach Though there were no intellectual flights or flashes his expositions were sound and devoid of puzzlement Justice Reddy has had a fairly long tenure as a Judge and he will always be remembered for his suave manners, equable temper and bon homie He carries with him in his retirement the good will of all the members of the Bar.

OUR NEW CHIEF JUSTICE

The appointment of Justice M Ananthanarayanan as Chief Justice in succession to Chandra Reddy, C J , is welcome and noteworthy This is perhaps the first time in the annals of the Madras High Court that a member of the Indian Civil Service has been made the permanent Chief Justice of the High Court Time was when various special considerations operated in filling up the post An Englishman alone could be thought of; a practising Barrister alone should be appointed. The old order has changed and many of the old notions have been discarded. As a student, Justice Ananthanarayanan has had a brilliant and enviable record. He has had rich experience as a District and Sessions Judge. He has had associations with academic work as Director of Legal Studies at the Madras Law College. He knows a number of languages and takes great interest in music Since 19th August, 1959 he has been a Judge of the High Court It is therefore in the fitness of things that he should become Chief Justice. We offer him our hearty felicitations.

BOOK REVIEW

LAW AND THE INSURANCE CONTRACT, *by Sri. M N. Srinivasan*, First Edition' 1965, 213 pages, Price Rs. 7-50. Published by Eastern Law House (P) Ltd, Calcutta

The subject of life insurance covers the bulk of this books, but other types of insurance are also dealt with. There are 16 chapters in all. Special and separated chapters are devoted to topics like Insurance Policy as Trust Property (as for instance under the Married Women's Property Act, 1874) ; Estate Duty and Life Insurance , Tax Laws and Life Insurance, Life Insurance and Stamp Duties; and General Insurance. The changing conditions of life in this country and the transformation of its economy from one resting on Agriculture and rural life into one based on expanding industrialisation and commerce and urban life have lent great prominence to the subject of insurance. While on the one hand the self-compelled savings of the insuring public have to be safeguarded more important still is the need to find the necessary funds to finance the industries undertaken in the public sector. The nationalisation of life insurance was an early result of such realisation. Since 1956, life insurance business in India has become a Government undertaking.

It is really a pity that the law relating to insurance lies scattered and has to be gathered from a number of sources like the Insurance Act, 1938, the Life Insurance Corporation Act, 1956, the Marine Insurance Act, 1963, and desultory provisions in enactments like the Contract Act, Transfer of Property Act, etc as well as from the decisions of Courts in India supplemented by English and American decisions This is wholly unsatisfactory. The author's plea for comprehensive legislation to guide the insurer and the insured deserves serious consideration.

The author's analysis of the insurance law is helpful and touches all its phases. His comments that the life insurance contract is really a contract of *adhesion* leaving practically no scope for any negotiation, and that the absence till now of any definition of *insurable interest* is a matter for regret have much force. His poser in the Preface —" An American can insure the life of his child and an English parent cannot What about the Indian parent? Can he or can he not?"—still awaits authoritative elucidation. His forthright remark on page 143 that the Married Women's Property Act, 1874, has no justification for its existence today is not without point.

The statement on page 32 that according to English law a minor's contract is not void but voidable should be taken at least with the modification that a contract for money lent, goods supplied or account stated in respect of a minor are wholly void. There are some printing errors. On page 106, 'section 91, Contract Act, should be 'section 91, Evidence Act'.

With more than a decade of the working of nationalised life insurance and a feeling in some quarters that the Life Insurance Corporation is only another illustration of the operation of Parkinson's laws and that it is tending to produce men who are but " lilies of the field that toil not nor spin ", and the need increasingly felt for the codification of the insurance law an enquiry into the subject of insurance and insurance laws, and their working at a high level seems to be absolutely necessary.

The author has done well in bringing out this book. The exposition of the law is clear and definite. The book will be useful not only to students but also to all who are concerned with Insurance.

JUSTICE N. KRISHNASWAMI REDDI.

We welcome cordially the appointment of Sri N. Krishnaswami Reddi as a Judge of the High Court. He goes to the Bench from the Bar and his appointment has been acclaimed with satisfaction. An Advocate-General even like his counterpart the Attorney-General in England is always in the line of succession to high judicial office If on occasions he declines the offer it is for valid reasons and altogether creditable to himself like relatively young age or temperamental disinclination etc. Sri Krishnaswami Reddi was just at the right age for becoming a Judge of the High Court—he is only about 52—when the ebullience and impatience of youth give place to a proper sense of values, sober thinking and balanced judgments. His standing at the Bar has been rich and varied and given him familiarity with the different branches of the law. He has experience of the Bar at the mofussil as well as at the metropolitan levels His work as Public Prosecutor of the Madras State from November, 1960 till April, 1964 and thereafter as Advocate-General has won for him nothing but praise His coming from the ranks of the people, his early upbringing by and close contacts with a man of God, and his apprenticeship under the late Sri V. V Srinivasa Iyenger should provide him with that sense of sympathy, humanity and humour in the administration of justice which makes it valued and ensures for it respect and awe. We hope that Sri Krishnaswami Reddi's presence on the Bench will add to its strength and enhance the prestige of the High Court.

THE EMERGENCY PROVISIONS AND THE INDIAN FEDERATION

By

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Part XVIII of the Indian Constitution containing Articles 352 to 360 specifically deal with the emergency situations or abnormal situations. This is an unique feature of the Indian Constitutional system which requires special attention of the constitutional lawyers for its correct interpretation. In the Constituent Assembly, these provisions were subjected to trenchant criticism by several members. Most of them professed that the provisions were incorporated and may be used to subvert the democracy in the country and destroy the balance of power between the federation and units. K. T. Shah called Article 359, which gives the President blanket authority to suspend the fundamental rights of citizens while a proclamation of Emergency is in operation " the general finale and crowning glory of this chapter of reaction and retrogression "[1] According to H. V. Kamath this Article took the palm over other constitutions of the world as " the autocratic negation of liberty."[2]

If we take into account the relative effect of the emergency provisions on the constitutional working we have to agree with Kamath's view that " there is no parallel to this chapter of emergency in the constitutions of the democratic countries of the world."[3] Critics of emergency provisions were equally emphatic in stating their view that " by these Articles we are reducing the autonomy of States to a farce."[4]

The other members of the Drafting Committee and supporters of these provisions were not happy with these provisions and were unaware of their drastic character. It was generally realized that they did not harmonize with the basic democratic pattern laid out in the Constitution. In other words the provisions were accepted as a necessary evil " a sort of safety valve which is intended to save the Constitution.[5]"

The emergency provision under our Constitution is a unique and unprecedented experiment, as a result of which vast discretionary powers are vested in the hands of the Executive. These powers may be used by the executive authority without the approval of the Legislature. No Executive in a democratic country exercises such power. Even if they have such powers it cannot be used without previous legislative sanction. For instance in America the President has no emergency powers. However he has been granted certain war powers which are subject to judicial review. The power to suspend the writ also belongs exclusively to Congress and not to the President. In one case of *Scheter* v. *U.S.* the Supreme Court of America observed that ' extraordinary conditions do not create or enlarge constitutional powers.[6]

In Great Britain also the Executive has no inherent emergency powers. The legislation passed by the Parliament provided for such an extraordinary power *e.g.*, the Defence of the Realm Act, 1914 and the Emergency Powers (Defence) Act, 1939.

In India, however, the President exercises unlimited powers during emergency period. In fact a proclamation of emergency can be issued before the actual occurrence of the emergency, " if the President is satisfied that there is imminent danger thereof.[7]" In order to correctly assess and evaluate the true implications

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1 Constituent Assembly Debates IX, p 196.
2. *Ibid*, IX, p 541
3 *Ibid*, IX, p. 103.
4. *Ibid*, IX, p. 143 (Sibbanlal Sakesena).
5. *Ibid*, IX, p 123 (T. T. Krishnamachari).
6. (1935) 295 U S 495.
7. Article 352 (3).

of the present enquiry, we have to peruse the relevant provisions of our Constitution on the present subject. As earlier stated Articles 352 to 360 of our Constitution deal with the emergency situations Three types of emergency situations are envisaged in these Articles

1. Grave emergency endangering the security of India from war or external aggression or internal disturbance (Article 352).

2. Emergency arising from the breakdown of the constitutional machinery in the States (Article 356).

3. Emergency arising from financial bankruptcy in any State (Article 360).

Before I proceed to deal with the relevant merits of these provisions, I would like to distinguish the proclamation of emergency under Article 352 from a proclamation of failure of constitutional machinery in a State under Article 356. These two types of proclamations differ not only as to the grounds leading to the proclamation but also as to effects. The proclamation of emergency under Article 352 can be made when —

1. The President *is satisfied* that a grave emergency exists.

2. The security of India or any part of the territory is threatened by war, or external aggression or internal disturbance.

However Article 356 empowers the Centre to takeover the administration of a State if "the President is satisfied that the Government of the State cannot be carried on in accordance with the provisions of the Constitution." The study of relevant effects of Article 352 and 356 would lead us to following conclusions :

1. That the right to move the Courts for the enforcement of fundamantal rights would not be affected in cases of a proclamation of failure of constitutional machinery of a State, but liable to be suspended in a case of proclamation of Emergency [1]

2. That the object of proclamation of emergency under Article 352 is to confer greater power on Union authorities but the State authorities would not cease to function. In case of proclamation of failure of constitutional machinery on the other hand, the Government of the State concerned, or some part of it would be superseded by the Union. In other words the provisions of the Constitution as regards to Government of the State would be suspended by a proclamation of second type, to the extent declared by it.

Thus Article 352 merely gives the Union concurrent powers of legislation and administration as regards State affairs, while the State authorities continue to function. Article 356 enables the Union to suspend the State Legislature altogether and the State Executive whole or in part. A critical and analytical study of the emergency provisions can be made under the following heads :—

1. The impact of Emergency provisions on the principle of State autonomy in a federal set up.

2. The Emergency provisions *v.* democratic principle.

The Emergency Provisions and the Federation

A distribution of Legislative and Executive powers between the Federation and units and a proper and legal exercise of their powers within their respective spheres constitutes the cornerstone of Federal Government. In this sense India is a Federation having secured the autonomy of the Federation and Constituent States within their own spheres. Now the question to be considered is whether the three types of emergencies envisaged respectively under Articles 352, 356 and 360 authorise serious in roads in the autonomy of the Constituent States or not.

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1. Article 359.

A proclamation of emergency under Article 352, can cause a virtual abrogation of the federal division of powers, since it extends the Union Government's control over the States in all matters and empowers Parliament to make laws on matters normally under the exclusive jurisdiction of the States. Acting under Article 354, the President can also abridge the financial powers of the States by suspending or modifying the operation of Articles 286 and 279 during the currency of proclamation of Emergency. Evidently the net effect of these provisions will be to so limit the autonomy of the States. In fact they cease to be the component units of a Federal Union and ' become parts of a decentralised unitary State.'[1]

The exercise of extraordinary powers by the Centre under Article 360 in the event of a financial emergency can also pose a serious threat to the autonomy of States. These powers may be used in order to extract the financial capacity of States H. V. Kamath pleaded in the Constituent Assembly that " danger to the financial stability or credit of India or any part thereof, ought not be regarded as an adequate ground for the proclamation of emergency."[2] According to Hriday Nath Kunzru, the wide powers made available to the Centre under Article 366 signified ' complete distrust of the Provinces." However the provision regarding financial emergency has not yet come in operation, therefore it is not proper to discuss here the impact of this provision on the Union-State relations.

The main target of criticism from the point of view of State autonomy, however, has been Article 356 under which the Centre can take over the administration of a State on the ground that a situation has arisen in which the Government of the State cannot be carried on in accordance with the provisions of the Constitution. This is a unique provision which has no parallel in the other Federations. There is no special provision in the American Constitution to empower the Federation to assume control over the States in order to control internal disorder. The only power given by the Constitution is the power of Congress to provide for calling of ' Militia ' to execute the laws of the Union and to suppress insurrections.[3] In the Constituent Assembly Debates Dr. Ambedkar stressed the importance of this provision and equated Article 356 of the Indian Constitution with the Article IV, section 4 of the American Constitution claiming that ' so far as that point is concerned, we do not think that the Drafting Committee has made any departure from the established principle[4] In the United States and Australia, the Federal Government is also authorized to protect the State against domestic violence, but federal intervention for this purpose can take place only on the request of the State concerned. In India, on the contrary, Central intervention in a State for purpose of protecting it against ' internal disturbance ' under Article 355 of the Constitution is not contingent on a request from the State Government concerned.

Further the control of Central over State is exhibited in the President's power to issue directions to the State Government under numerous provisions of the Constitution.[5] Article 365 also arms the President with an all pervasive power to suppress the Government of a State on the ground that its failure to carry out any or some of his directions has created a situation contemplated in Article 356.

Thus by virtue of various provisions the Central Government exercises utmost control over the States Further it has power not only to intervene in the sphere of State autonomy but also to overthrow the Governments of constituent units In this regard Article 356 of our Constitution seems to be incompatible with the federal principle. Therefore the statement made by Alladi Krishnaswami Aiyar appears to be out of place when he declared in the Constituent Assembly that " The pro-

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1. Sen, D K ' A Comparative Study of the Indian Constitution (1960), p. 233.
2 Constituent Assembly Debates, p 363
3 Article IV, section (4)
4 Constituent Assembly Debates IX, p 176
5 Article 256, the President may issue direction to the State ; Article 257 (1) to ensure that the executive power of every State shall be so exercised as not to impede or prejudice the exercise of the executive power of the Union.

tagonists of Provincial or State autonomy will realise that apart from being an impediment to the growth of healthy Provincial or State autonomy, this provision is a balance of Provincial or State autonomy, because the primary responsibility is cast upon the Union, to see that the Constitution is maintained "[1]

Such a view would give rise to certain doubts about the intention of the framers of the Constitution in framing this Article The various disturbances and separatist tendencies working at the time of making of the Constitution, provided a background over which this Article has been framed That is the reason why the framers have taken due care to ensure orderly constitutional Government in the States and to erect a strong defence against forces of disruption. According to Dr Ambedkar, the over-riding powers of the Centre under this provision were justified on the ground that " the residual loyalty of the citizen in any emergency must lie to the Centre and not to the Constituent States "[2]

Emergency Provisions v *Democratic Principles*

Emergency provisions of the Indian Constitution have been criticised even more vehemently on the ground that they place in the hands of the Union Executive the dangerous power of curbing civil liberties By virtue of these provisions the freedoms guaranteed to citizens under Article 19 are suspended and further the President is authorized to suspend such other rights detailed in Chapter III of the Constitution as he may by order specify. According to H V. Kamath " the Chapter XVIII as it proceeds towards its grand finale, annuls to a large extent the fundamental rights conferred by Part III of the Constitution "[3] The emergency provisions in his view, lay out the blue print of a totalitarian Police State [4]

The democratic principles are often diluted during the course of emergency or war. ' War as one of the members of Constituent Assembly reminded cannot be fought on the principles of Magna Carta [5] -A choice has to be made between the principles of individual liberty and national security and the former usually gives way to the latter. However this does not mean that the Executive has every power to curb the freedoms of the people during emergencies as in India.

In the United States of America, the Constitution lays down that the privilege of the writ of *habeas corpus* shall not be suspended unless when, in cases of rebellion or invasion, the public safety may require it "[6] However as we have already pointed, the right to suspend the writ belongs to Congress and not to the President. The Courts also retain the power to examine the validity of these extraordinary powers exercised by the Government. In Great Britain also, the Parliament confers extraordinary powers on the Executive But during emergency also the 'Rule of Law' is not abrogated and the Courts continue to work as a protector of civil liberties.

Thus the powers given to the Indian President during emergency are extensive and may be misused to curb the cherished fundamental rights of the people. The President's power of proclaiming emergency seems to lay too great a burden on an individual. Further the Constitution does not give a precise definition of ' emergency ' and leaves things to the President's ' satisfaction '. In order to remove this lacuna some of the members of the Constituent Assembly suggested certain amendments by which the power of suspending fundamental rights would be vested either in Parliament or in the President subject to ratification by the Parliament. However these suggestions were not accepted and the said power was ultimately left to the discretion of the Executive in the hope that he will act in a reasonable and proper manner.

However during the last fifteen years, the Union Executive has shown no eagerness to use its powers under Articles 352 and 359 in order to curtail the funda-

1. Constituent Assembly Debates IX, p 150.
2 *Ibid*, VII, p 42
3 *Ibid*, IX, p 103
4. Kamath's view, *Ibid* IX, p 545
5. Constituent Assembly Debates IX, p 552.
6. Article I, section 9(2)

mental rights of the citizens Since the proclamation of Emergency was issued on 26th October, 1962, the freedom declared under Article 19 of the Constitution stands legally, suspended. In exercise of his powers under Article 359, the President of India has also suspended, by order, fundamental rights guaranteed under Articles 14, 21 and 22 But so far there seems to be no unnecessary restrictions on the civil liberties The power has been in fact used against a small number of individuals only whose activities were prejudicial to the national security The opposition parties often criticise that this power has been used arbitrarily and this amounts to abuse of authority on the part of the Government. But this criticism is far from true. In spite of proclamation of emergency the citizens are left free to exercise their natural rights. The freedom of speech and expression has been used to criticise the policies of the Government The Defence of India Rules have also been criticised on the ground that they give wide powers to the Government and this will lead to a totalitarian State If we look into the various criticism of Government, one feels justified in saying that, ' No critic has had reason to complain that the Defence of India Rules has cramped his style "[1]

Finally critics of the emergency provisions in the Constitution of India express the fear that they will enable an ambitious and unscrupulous President to establish Dictatorship over the country. It would, therefore, appear, writes D K Sen " that unlike other federal Constitutions, the Constitution of India contains provisions which not only enable the Union authorities to abrogate the federal character of the Constitution itself, but also to establish a virtual Dictatorship of the President of the Union."[2] According to another writer, " his emergency powers coupled with certain other powers may well pave the way for ambitious unscrupulous President personal dictatorship ".[3]

This criticism is not justified when we realise that the President of India is a *constitutional* head of the State who must always act on the advice of his Council of Ministers. He is not a real Executive who may exercise his powers in his discretion. " The whole scheme of the (Indian) Constitution " declared T T Krishnamachari " has been envisaged on the basis that the President is a constitutional head even though we have not put it in so many words in the Constitution "[4]. It would therefore, seem that the President cannot become a despot unless the Council of Ministers become a tool in his hand, an extremely improbable development.

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1 The *Hindustan Times* (Delhi), Editorial March 24, 1963

2. Sen, D K, *Op Cit*, p 232.

3. Choudhary, L P " Emergency Government provisions in the Indian Constitution ". The Indian Journal of Political Science, Vol XXI, No 4, p 359.

4. Constituent Assembly Debates IX, p. 124.

WRITS AGAINST EXECUTIVE ORDERS BASED PARTLY ON INVALID GROUNDS

By

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The decision of the Supreme Court in *Ram Manohar Lohia* v. *District Magistrate, Patna*[1], is a welcome departure from the line of reasoning adopted by that Court in *State of Orissa* v. *Bidyabhushan Mohapatra*[2]. The question involved in both cases was whether an impugned executive order based on two or more grounds one or some which are held to be invalid under law would be sustained by the Court on the basis of the valid ground or would be struck down leaving it to the authority concerned to consider whether it would still pass the order on the available ground or grounds alone.

Lohia's case[1], it may be remembered, was concerned with an order of detention passed on him purporting to be made under the Defence of India Rules with a view to preventing him from acting in a manner prejudicial to public safety and the maintenance of law and order. An order under the Defence of India Act and Rules if made on the ground of " public safety " or " public order " would be immune from attack based on Articles 21 and 22 of the Constitution in view of the Presidential Order under Article 359 during the continuance of the proclamation of emergency made under Article 352. It was contended on behalf of the State that the expression " maintenance of law and order " was not different from " public order " but this contention was rejected by the Court with the result that out of the two grounds on which the order of detention was expressed to be made one fell to the ground and the question was whether the order of detention was to be sustained on the basis of the other ground of " public safety " on which an order of the kind could undoubtedly have been made. While Raghubar Dayal, J , dissented the majority (Sarkar, Hidayatullah, Mudholkar and Bachawat, JJ.) held that the order could not be thus sustained. Hidayatullah, J., observed that there was nothing to show that the valid purpose was considered to be more essential then the other and since an enquiry into the reasons was not open to the Court, the order must be declared to be outside the Defence of India Rules. Mudholkar, J., observed that since it was impossible to say which reason " weighed with " the concerned authority, the valid one or the other, its order could not be sustained. Sarkar, J., referred to *Shibbanlal Saxena* v. *State of U.P.*[3] and held the order of detention as illegal though it mentioned a ground on which a legal order could have been based since it could not be said " in what manner and to what extent the valid and invalid grounds operated on the mind of the authority concerned and contributed to the creation of the subjective satisfaction which formed the basis of the order".

The above, it is submitted with respect, is a proper approach to the problem posed before the Court in cases of a similar nature. However, it has to be noted that in the earlier decision of the Court in *Bidyabhushan's case*[2], a contrary view has been taken.

Bidyabhushan's case[2],related to disciplinary proceedings against a public servant on several charges under the Conduct Rules, which specified several acts of misconduct and also provided for a gradation of punishments. The Disciplinary Tribunal held the charges as proved and passed an order of dismissal. On a petition for a writ of *certiorari* by the officer, the High Court (whose decision is reported in A I R. 1960 Orissa 68, held that the findings on two of the five charges were vitiated as the Tribunal failed to observe the principles of natural justice and quashing the order of dismissal, remitted the matter to the Disciplinary Tribunal to consider whether on the findings in respect of the other charges (which

1 A I R. 1966 S C 740.
2. A I R. 1963 S C 779
3. (1954) S.C J 73 (1954) 1 M.L J. 143.

were accepted) it would still impose the punishment of dismissal or a lesser one. The matter was taken up in appeal by the State. The Supreme Court allowed the appeal and set aside the order of the High Court and the direction to the Government to reconsider the question of punishment. The Court came to the conclusion on the reasoning that if the order of the disciplinary authority may be supported on any finding as to substantial misdemeanour for which the punishment can be lawfully imposed it was not for the Court to consider "whether that ground alone would have weighed with the authority" in dismissing the public servant.

It is true that the above decision which is a unanimous judgment of five learned Judges has not been referred to in *Lohia's case*[1] cited earlier and therefore cannot in a proper sense, be said to have been overruled by the latter. But it would appear that there has been some rethinking on a similar question as hoped for by Chief Justice Narasimhan of the Patna High Court (*see* A.I.R. 1966 Journal p. 1) and it may be hoped that when the occasion arises the Supreme Court would specifically reconsider the question decided in *Bidayabhushan's case*[2].

A PLEA TO AMEND THE RULE OF THE DESTRUCTION OF RECORDS.

By

T. S. SUBRAMANIA IYER, *Advocate, Tiruchirappalli*-8.

A decree under the present Limitation Act is alive and enures for a period of 12 years—as against what was obtaining previously only for 3 years with a necessity to file a step-in-aid of execution every 3 years if you want to make it alive for 12 years. In other words, a decree-holder can obtain a decree against a defendant *ex parte*, or contested and may keep quiet without executing the same until 10 or 11 years even, and then spring the execution proceeding on the defendant. In this there is an unintentioned snag which may work a great injustice on an unsophisticated defendant. I shall explain this. A Provincial Small Cause Suit records are to be destroyed after 4 years—And we can well conceive of an unscrupulous plaintiff having obtained an *ex parte* decree against a simpleton defendant on palpably false allegations. He can surprise the defendant with an execution process—a notice or a warrant—say 10 years after, when the suit records would have been destroyed 6 years back and the defendant would have no record to apply for a copy and prove his non-liability. And the plaintiff is placed in an advantageous position. Therefore the rule as to the destruction of records should be so amended that the time for the destruction is co-terminous or co-existent with that of the time for limitation of the decree. Otherwise there is likelihood of injustice being done, be it even in a small number of cases.

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1. A.I.R. 1966 S.C. 740.
2. A.I.R. 1963 S.C. 779.

THE LATE SIR C. V. ANANTHAKRISHNA AIYAR.

To most of the junior members of the Bar Sir C. V. Ananthakrishna Aiyar would be only a name. He had retired as a Judge of the High Court in 1934, more than thirty years ago But to the senior members he was a type of person not to be easily forgotten Sri Ananthakrishna Aiyar has passed away full of years and honours He was 93 at the time of his death It is seldom that a Judge lives to be a nonagenarian Even Dr Subramanya Aiyar died in his eighties.

As a lawyer Sri Ananthakrishna Aiyar had enjoyed a considerable practice and was in the first flight among the members of the Bar He commanded great respect from the Judges. He was always ready to argue his cases and rarely sought an adjournment. His advocacy was devoid of embellishments and flourishes but was marked by thoroughness, careful preparation, and calm unruffled presentation. There was no subtlety about his arguments and he had no surprises to spring He was rooted too firmly to the **terra firma** and facts. He might be persistent but was never combative. To him, law was not a jealous mistress merely. His entire time he gave to her His early association with Justice Sundara Aiyar till the latter became a Judge of the High Court and his up-to-date knowledge of case-law were great assets to him in the practice of the profession In due course official recognition came to him. He became successively Government Pleader, Advocate-General and Judge of the High Court If genius is nothing but an infinite capacity to take pains Sri Ananthakrishna Aiyar could be said to be one. He shunned publicity and had no adventitious aids.

As a Judge for about six years he was absolutely conscientious and he always heard Counsel with great patience He was not too much talkative nor did he indulge in any brow-beating His judgments though not brilliant or characterised by literary flavour were sound

Sri Ananthakrishna Aiyar was known for his austere life, unostentatious manners, habits of regularity, punctuality and punctiliousness. He would not like to waste time. Even in going from his Chambers to the Court Hall where he was to sit he would set a cracking pace which his mace-bearer would find it very difficult to keep He had few interests outside the law. After retirement from the Madras High Court he served for a spell as Chief Justice of the Cochin High Court

Like Sri P. Venkataramana Rao still happily with us, Sri Ananthakrishna Aiyar had the pleasure of seeing his son also becoming a Judge of the High Court Sri Ananthakrishna Aiyar's passing away removes from our midst an interesting type of person worthy of emulation in several respects.

TRIBUNALS AND THE CONSTITUTION.

by A. S. KUPPUSWAMI, *Advocate, Tirunelveli*

A substantial part of the large volume of judicial work in our Welfare State with its ever increasing powers over the citizen is done by judicial and quasi-judicial tribunals as distinguised from Courts of Law As the actual realisation of justice is a classical test for civilisation our Constitution has provided four valuable safeguards for justice by these tribunals The working of the safeguards and the resulting quality of justice call for examination

The first safeguard is the separation of the Judiciary from the Executive Article 50 of the Constitution directs that "the State shall take steps to separate the Judiciary from the Executive in the public services of the State" Article 37 states that the above principle is "fundamental in the governance of the country and it shall be the duty of the State to apply the principle in making laws" The political wisdom of this constitutional mandate is beyond controversy The separation of the Judiciary from the Executive is necessary under all forms of Government Under democracy, it is imperative The Executive in our democratic State is the elected Minister with his subordinates Power-politicians behind the ballot-box under adult franchise in our immature democracy are yet to learn the elements of fairplay in politics Their pulls and pressures are very likely to impinge on the Executive The Judiciary has to be protected from this onslaught The separation of the Judiciary from the Executive can alone in such a context secure the necessary independence of the Judiciary This constitutional mandate is unfortunately a dead-letter, so far though 16 years have elapsed since the commencement of the Constitution in 1950

The second safeguard is Article 227 of the Constitution It enacts that "every High Court shall have superintendence over all tribunals" in the State. This includes administrative superintendence This mandate also is yet to be implemented The State Government has apparently not furnished the requisite finance to the High Court

The third safeguard is a judicial discretionary power granted to the Supreme Court under Article 136 to give Special Leave to Appeal to that Court from any decision of a tribunal This is no doubt of very great value for justice. But it is open only to the rich There is also the question of judicial delay

The fourth safeguard is the right to move the High Court for a Writ under Article 226 or judicially under Article 227 This is also a valuable right But the issues that are open for examination under these Articles are of a limited character Here also there is the question of judicial delay

The above in outline is the record of performance with its light and shades in this important sector in the judicial administration of our Welfare State Such a record challenges examination The two administrative safeguards for justice, **viz.**, the separation of the Judiciary from the Executive under Article 50 and the High Court's power of administrative superintendence under Article 227 of the Constitution, have to be implemented without further delay In addition to these, the need for the following well established requisites of the judicial process should also be examined, **viz.**, (a) a First Appeal from a tribunal to a Court of law both on the facts and the law (b) a Second Appeal on issues of law only to the High Court (c) judicial training for the Officers that function as tribunals (d) justice as defined by the law should alone be the criterion for decision, and (e) periodical revision and codification of the law

This is a big problem for judicial reform Our huge electorate under adult franchise has, in the final analysis, to give its verdict on this big issue The necessary public opinion has to be created and duly cultivated for this task. The promotion and support of legal reform are among the statutory functions of the Union and State-Bar Councils under sections 6 and 7 of the Advocates' Act XXV of 1961. The members of the legal profession are the juristic leaders of the community This is non-political constructive public work of high value for justice Justice is a precondition for democracy as well as material and spiritual welfare.

A CRITICAL STUDY OF THE DOCTRINE OF FRAUDULENT TRANSFERS.

By

P. SHESHADRI, B A., LL. M., *Junior Lecturer, Law College, Osmania University.*

In English Law, the rules relating to fraudulent transfers were dealt by the Statute 13 Elizabeth. This provided that a transfer of land or goods made with intent to defraud or delay creditors became voidable at the instance of the creditors so defrauded or delayed. The only exception that was recognised to the above rule was that if such transfer of property was made to a *bona fide* purchaser for consideration who took the property without notice or knowledge of the fraudulent intent of the transferor, the transfer was held good. It could therefore, be clear that the object of the Statute 13 Elizabeth was to protect the interests of the creditors and the statutory rule applied equally to lands as well as goods.

The application of the Statute 13 Elizabeth can be well illustrated by the *Twyne's case*[1]. In this case a debtor made a secret alienation of the whole of his property at the time when a suit instituted against him by the creditor was pending. An interesting point significant in this case was that the debtor continued to retain the possession of the property, though he appeared to have transferred his whole interest in the property to the transferee. There was sufficient evidence in this case that the transferee took the property by paying a valuable consideration. The point for determination in this case, therefore, was whether the interests of the transferee could be protected on the mere ground that he paid a valuable consideration for obtaining the property under the transfer. It was decided by the Court that a transferee could be protected only when he not only pays the consideration but also acts with *bona fide*. In other words, the transferee should not only pay consideration but he should also act with *bona fide* and should not participate in the fraudulent design of the transferor. On a careful consideration of the element of secrecy attending the transaction the Court had no difficulty in coming to the conclusion that there was no real transfer at all and the presumption was that the transaction was collusive and it could not be ascribed as a sale transaction but could be considered only as the creation of a trust for the benefit of the transferor. The Court speaking through Lord Coke observed thus: "A good consideration does not suffice if it be not also *bona fide* ".

Again the non-delivery of possession by the transferor also raised presumption that the alleged transfer of sale was fictitious.

According to the provisions of the Statute 13 Elizabeth a fraudulent conveyance of property could not only be questioned by existing creditors at the time of transfer but can also by impeached by subsequent creditors. In other words, if a person makes a settlement thinking of his future indebtedness at a future date the transaction is equally fraudulent and liable to be challenged. In a leading case a person embarked upon a dangerous trade which was likely to put him to considerable loss, having in mind the future indebtedness. He made a voluntary settlement of his property. The question was whether this settlement can be challenged in view of the fact that at the time of making it, the debtor was fully solvent. The Court held that since the transferor at the time of the settlement contemplated a state of things which were likely to put him into a state of insolvency and the effect of the transfer was to avoid or defeat the interests of the creditors, the transaction was liable to be set aside as fraudulent.

1. 76 E.R. 809.

Another interesting point worth notice about the Statute 13 Elizabeth was that, though the language of the Statute suggested that the transfer would be void only when tainted with fraud, yet the judicial interpretation on the Statutes was something very curious inasmuch as the judicial trend appeared to treat every voluntary disposition as void whether made with or without fraudulent intention. There can be no doubt that such a strained interpretation by the Judiciary led to considerable hardships. With a view to overcome such difficulties the Voluntary Conveyancing Act, 1893, was passed in England. This provided that a mere voluntary transfer of property will not be void if such transfer took place *bona fide*, and without any fraudulent intention on the part of transferor. The English Transfer of Property Act was so amended as to deal with only disposition of land and not with goods and also to decide in each case as to whether the fraudulent intention existed in the mind of the transferor at the time of the transfer. In other words, the existence of fraudulent intention was treated as a question of fact to be determined in each case on the basis of evidence adduced by the parties.

The Indian Law dealing with the doctrine of fraudulent transfers passed through two important stages *i.e.*, section 53 prior to and after the Amending Act of 1929. Prior to the Amending Act of 1929, there was considerable confusion as to the application of this doctrine. Section 53 before the Amending Act of 1929 read as follows :—

" Every transfer of immovable property made with intent to defraud prior or subsequent transferees thereof for consideration or co-owners or other persons having an interest in such property or to defeat or delay the creditors of the transferor is voidable at the option of any person so defrauded or delayed.

Where the effect of any transfer of immovable property is to defraud, defeat or delay any such person, and such transfer is made gratuitously for a grossly inadequate consideration, the transfer may be presumed to have been made with such intent as aforesaid.

Nothing contained in this section shall impair the rights of any transferee in good faith and for consideration."

A clear analysis of the above provision reveals that the section dealt with protection to prior purchasers, co-owners, etc. It also contained the English rule of evidence which was existing prior to Voluntary Conveyancing Act, 1893 which provided that a voluntary transfer or a transfer with insufficient consideration can be equated to fraudulent intention. It can be seen without any difficulty that no protection is required to prior purchasers and co-owners, as it was unnecessary. Further the rule of evidence provided in the section to a great extent restricted the power of the Court to objectively determine the existence or otherwise of fraud in the transaction, according to ordinary rules and accepted principles of evidence.

Section 53 was recast in the year 1929 and it reads as follows :—

" *53 *Fraudulent transfer.*—(1) Every transfer of immovable property made with intent to defeat or delay the creditors of the transferor shall be voidable at the option of the creditor so defeated or delayed.

Nothing in this sub-section shall impair the rights of a transferee in good faith and for consideration.

Nothing in this sub-section shall affect any law for the time being in force relating to insolvency.

A suit instituted by a creditor (which term includes a decree-holder whether he has or has not applied for execution of his decree) to avoid a transfer on the ground that it has been made with intent to defeat or delay the creditors of the transferor, shall be instituted on behalf of, or for the benefit of all the creditors.

* Substituted for the original section by section 15, Act XX of 1929.

(2) Every transfer of immovable property made without consideration with intent to defraud a subsequent transferee shall be voidable at the option of such transferee.

For the purposes of this sub-section no transfer made without consideration shall be deemed to have been made with intent to defraud by reason only that a subsequent transfer for consideration was made."

A transfer would be considered as fraudulent if the creditor goes beyond what is necessary for protecting his interests and thereby becomes a party to the fraudulent design of the debtor. The mere existence of a valuable consideration is not *per se* sufficient to protect the interests of the transferee. What is required is that the transferees should act in good faith *i.e.*, to say they should not become a party to the fraudulent design of the transferor.

The Indian Law expressly and in unequivocable language recognise the rights of a debtor to prefer one creditor over another. A mere preference of one creditor over another cannot be an instance of fraud on the part of the debtor. It is open to the debtor to pay any creditor he likes and the transfer made by such preference will not be questionable. This proposition of law can be amply illustrated by the decision of the Privy Council in the case of *Musahar Sahu* v. *Hakim Lal*[1]. The facts of this case are very interesting. A creditor brought a suit against his debtor and prayed for attachment of the property before judgment. The debtor filed an affidavit in the Court to the effect that he had absolutely no intention whatsoever to alienate the property. In view of such an affidavit filed by the debtor the Court dismissed the application of the creditor for attachment of the property. Subsequently, the debtor sold away the property to another creditor in discharge of a genuine debt. The creditor challenged this alienation on the ground that it was void being contrary to the declaration made by the debtor in the Court. The Court, however, observed that the transfer is perfectly valid and not liable to be questioned as there is a statutory right in the debtor to prefer one creditor over another. From the views expressed by the Court the following points emerge :—

(i) A mere preference of one creditor over another cannot be considered as an instance of either defeating or delaying the creditors.

(ii) In order that a transfer be challenged, it should be such a transaction which must remove the property from the creditors to the benefit of the debtor. In other words, the debtor should retain for himself a benefit under the transfer.

(iii) The debtor may pay one creditor without paying the others. Such a transfer will be perfectly valid, if it is made for adequate consideration in discharge of or in satisfaction of genuine debts.

4. Section 53 provides that it will not affect any law for the time being in force relating to insolvency. In other words, the remedies available to the creditors under the provisions of the Insolvency Act have been statutorily protected and safeguarded by the Transfer of Property Act. Therefore, in cases where a debtor transfers his entire property in discharge of a particular debt to a particular creditor and leaves other creditors unpaid such creditors must resort to the provisions of the Insolvency Act to enforce their rights against the debtor. The insolvency legislation provides as follows :—

(i) A petition must be filed by the creditors within three months from the date of transfer, seeking a direction from the Court that the debtor be declared insolvent.

(ii) The creditors must file a petition in the Court to declare the transfer made by the debtor as void on grounds of fraudulent preference after the debtor has been adjudicated or declared as an insolvent by the Court. This petition should be filed within a period of one month from the date of declaration of the debtor as insolvent by the Court.

1. L.R. 43 I.A. 104.

After the transaction is set aside on grounds of fraudulent preference, the other creditors can enforce their rights against the property so transfered by the debtor.

In order that the rights of a transferee should be protected it is necessary that he should pay the full consideration. The payment of a part of the consideration will not by itself protect the interests of the transferee, inasmuch as, a transaction which is intended to defeat or delay the creditors cannot be considered in part good and in part bad. Further, the provisions of section 53 will be inapplicable to the case of benami or nominal transfers because a benami transfer is no transfer in the eye of the law as much as in such transfers the title remains in the transferor even after the transfer

In order to maintain a suit to set aside a fraudulent transfer it should be instituted by a creditor on behalf of and for the benefit of all the creditors. The underlying principle appears to be that the transferee should not be exposed to multiplicity of proceedings which may be likely to be instituted by all the creditors.

Another interesting point worth remembering would be the rights of a transferee to recover what he paid to the transferor in purchasing the property while participating in the fraudulent design of the transferor, before the fraudulent purpose is carried out. The answer to such a question can be to the effect that if the contemplated fraud is not carried out, he may be entitled to recover but not so, after it was carried out. Such a thing would obviously be governed by the principle "*in pari delicto potior est conditio possidentis*" (where both the parties are equally guilty, the conditions of the defendant is better).

A clear study of section 53 under the amended Act of 1929 shows a remarkable improvement over the old section 53. The improvement proceeds on the following lines :—

1. A transferee is protected from the multiplicity of suits at the instance of various creditors.

2. A mere voluntary transfer or a transfer based on inadequate consideration cannot be a ground to treat the transfer as fraudulent. In other words, fraudulent intention on the part of the transferor must be independently established by evidence.

3. The protection to prior purchasers and co-owners is abolished remedying thereby the confusion which prevailed in the application of the old section 53.

4. The cardinal principle that a mere preference of one creditor over another cannot be treated as a fraudulent intent is fully affirmed

5. The provisions of Insolvency Act are in no way affected by the operation of section 53. Creditors who are deprived of their rights under section 53 can nevertheless resort to the provisions of the Insolvency Act to enforce their claims against the debtor.

I therefore, subscribe to the view that the present provisions of section 53 affords sufficient and adequate protection in the matter of safeguarding the rights of the creditors from the fraudulent transfers that may be made by the debtor with a view to defeat or delay the creditors. There is also sufficient safeguards in protecting the interests of *bona fide* transferees for consideration who acquire their interests without participating in the fraudulent design of the transferor. Further the conflicting rights and interests of the *bona fide* transferees and the creditors have been harmoniously reconciled.

SPECIAL TRIBUNALS FOR CLAIMS TO RYOTWARI PATTAS UNDER ACT XXVI OF 1963 (MADRAS) AND ITS JURISDICTION

By

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The Madras Inam Estates (Abolition and Conversion into Ryotwari) Act XXVI of 1963 has created a hierarchy of Special Tribunals, to decide claims for ryotwari pattas under the Act. Two questions arise in relation to it. (1) What exactly is the nature of its special jurisdiction with reference to the vital issue of title to the lands ? (2) How far does this special jurisdiction bar the general jurisdiction of the civil Courts under section 9, Civil Procedure Code, to decide the above issue of title ?

The hierarchy of Special Tribunals comprises three functionaries. The original trial Judge is the Settlement Officer, who functions under section 12 (1) of the Act. Two Appeals are provided from his decision. The first Appellate Authority is a single Judicial Officer not below the rank of a Subordinate Judge, constituted by the State Government. This authority is termed a "Tribunal" in the Act. This Tribunal functions under section 12 (2) of the Act A Second Appeal lies to a Special Appellate Tribunal consisting of two Judges of the High Court nominated from time to time by the Chief Justice in that behalf. This second appellate authority functions under section 46 of the Act.

What is the jurisdiction conferred on this hierarchy of Special Tribunals ? Section 12 (1) describes the jurisdiction of the Settlement Officer, in the following terms :

" The Settlement Officer shall examine the claims of any person for a ryotwari patta under section 9, or section 10, or section 11, as the case may be, and decide in respect of which lands, the claim should be allowed."

An examination of the three sections 9, 10 and 11 is necessary, at the outset, for a proper understanding of the specific issues which are to be decided by the Settlement Officer. Section 9 enacts that the landholder shall with effect on and from the notified date, be entitled to a ryotwari patta in respect of the lands specified in that section. Section 10 enacts in similar terms that every ryot shall be entitled to a ryotwari patta for the lands described in that section with effect from the notified date. Section 11 enacts that where no person is entitled to a ryotwari patta under section 9 or 10, the land vests in the Government, and that the cultivators of the lands shall be entitled to ryotwari pattas for the concerned lands in the order of preference as stated in the section, with effect from the date of the Grant. The notified date is the date on which the Act comes into force in the estate as notified in section 1 (4) of the Act by the Government. If a ryotwari patta is claimed

under any one of the sections 9, 10 or 11, the Settlement Officer has to decide in respect of which lands the claim for ryotwari patta should be allowed. What is the specific legal right that is conferred by the Settlement Officer's decision of title to a ryotwari patta granted to a claimant under sections 9, 10 or 11 ? This is the crux of the issue before the Settlement Officer in reference to the vital question of title to the land

This vital issue of title to the land for which a ryotwari patta is granted under sections 9 to 12 of the Act has to be considered in the light of the object as well as the scheme of the Act The object of the Act as stated in the Long Title is to provide for the acquisition of the rights of landholders in Inam Estates and the introduction of Ryotwari Settlement in such estates The scheme of the Act in reference to the grant of ryotwari patta appears from sections 3, 9 to 12, 71 and 46. Section 3 enacts (1) that the entire Inam Estate shall stand transferred to the Government free of encumbrances with effect on and from the notified date and save as otherwise expressly provided in the Act, and (2) that the landholder and every other person concerned shall be entitled only to such rights as are recognised or conferred on them by or under the Act. Section 9 enacts that the landholder shall be entitled to a ryotwari patta for the lands which immediately before the notified date belonged to him as private land Section 10 enacts in the main, that a ryot shall be entitled to a ryotwari patta for the ryoti lands in his holding, immediately before the notified date. Section 11 enacts that if no person is entitled to a ryotwari patta under sections 9 or 10 and the land vests in the Government and that the cultivators of the lands are to be granted ryotwari patta in the order of preference stated in the section as from the date of the Grant. Section 71 enacts that the Settlement Officer's Order in respect of matters to be decided for the purposes of the Act is final subject to two appeals as mentioned above and that it shall not be liable to be questioned in the civil Court Section 46 enacts that the Appellate decisions are binding on all persons. This, broadly speaking, is the scheme of the Act.

What is the legal right, title and interest of the landholder in the lands which are described in section 9, and for which he gets a ryotwari patta according to the decision of the Settlement Officer under section 12 (1), subject to the appeals from the same ? The lands covered by section 9 are the landholder's private lands under the Inam tenure What is the object of the Act in respect of these lands ? There is no question of the acquisition of the landholder's rights in these lands for the purpose of the Inam Abolition, as the ryots in the estate have, *ex hypothesi*, no manner of right in the private lands of the landholder The only statutory process in respect of these lands is the issue of ryotwari patta to the landholder The landholder's pre-existing title under the Inam tenure is thus recognised by the Act On this view, it is clear that the landholder in whose favour the Settlement Officer gives a decision for ryotwari patta under section 12 (1) is recognised as the lawful owner of the lands with full title to the same Section 9 has, no doubt, imposed a condition of 3 years' farm-cultivation during 1948-60 for the grant of the patta There are also some other conditions But they do not affect the fundamental character of the lands as the landholder's private lands.

The language of section 11 corroborates the above view. The section runs thus :

"Where no person is entitled to a ryotwari patta in respect of a land in an Inam estate under section 9 or 10, and the land vests in the Government, the persons specified in the section shall be entitled to a ryotwari patta".

This indicates that if a person is entitled to a ryotwari patta in respect of a land under section 9 or 10, that land vests in the concerned pattadar.

But if there are rival claims to the landholder's interest in the lands under section 9, those rival claims are beyond the scope of the Settlement Officer's decision. This is clear from the definition of the word "landholder" in that Act Section 2 (8) contains the definition in reference to an existing inam estate The word "landholder has the same meaning as in section 3 (5) of the Estates Land Act Section 3 (5) Estates Land Act enacts that a landholder is a person whom the Collector recognises or nominates as a landholder for the purposes of the Act, subject to any decree or order of a competent civil Court, in the event of a dispute. In respect of a new Inam estate, *Explanation* II of section 2 (8) (ii) of the Act XXVI of 1963 contains a similar provision Neither the Act XXVI of 1963 nor the Rules contain any provision for the decision of the rival claims to the landholder's interest. There is no provision for any pleading in respect of these rival claims or for any regular trial of the same as under the Civil Procedure Code.

Thus, the landholder as defined in the Act gets full title to the lands for which he gets a patta under sections 9 and 12 (1) This title is conclusive, as against the ryots as well as the Government But it will be subject to the decision of the Civil Court on the rival claims of other persons to the landholder's interest.

Let us take the case of a ryot who gets a ryotwari patta for the lands described in section 10 These lands are described as the petitioning ryot's lands which were finally held to be ryoti lands under section 3-A of the Act XXX of 1947, or ryoti lands which were properly included or ought to have been included in the ryot's holding immediately before the notified date This shows that under the Inam tenure the concerned lands were the property of the ryots as against he Inamdar It is not the object of the Act to disturb the title of the ryots. Further a reading of section 11 as described above indicates that the ryot's patta lands under section 10 are vested in the ryot It is thus clear that a ryot's who is entitled to a ryotwari patta under section 10 gets, *prima facie*, full title to his patta lands.

But this statement of the ryot's title has to be taken in the light of the definition of the word 'ryot' in the Act A ryot is defined in section 2 (15) of the Act. In reference to an existing inam estate, the word 'ryot' has the same meaning as in section 3 (15) of the Estates Land Act A person who holds a land is a ryot under section 3 (15) of the Estates Land Act The Estates Land Act, however, provides in section 145 (6) (*c*) for a right of suit in the civil Court in the event of a dispute as to the truth or validity of a transfer of a ryot's holding or its devolution by operation of law There may also be rival disputants of title to the ryot's interest in the holding They may take a variety of forms as illustrated by a number of decisions under the Estates Land Act and the Estates Abolition Act XXVI of 1948 such as (*a*) *Swami-*

natha Odayar v. *Asan Muhammad Rawther*[1] (*b*) *K. S. Soosai Udayar* v *S. Andiyappan Ambalam*[2] (*c*) *Adakalathammal* v. *Chinnayyan Panipundar*[3] (*d*) *Krishnaswami Thevar* v *Perumal Konar*[4], (*e*) *A.R Sanjeevi Naicker* v *P M. Shanmuga Udayar*[5] In reference to a new inam estate also the position is practically similar. There is no provision a new inam estate also the position is practically similar. There is no provision in the Act XXVI of 1963 or the Rules for the decision of rival claims to the ryot's interest. There is no provision for the requisite pleadings or for a regular trial of the same It follows from the above, that the decision of the Settlement Officer under sections 10 and 12 (1) in favour of a ryot for a ryotwari patta for the lands described in section 10 is subject to the right of a Civil suit by his rival claimants for the ryot's interest.

Let us take the case of a claimant under section 11. Section 11 makes it clear that the land is vested in the Government and that the Act creates new rights in three classes of cultivators enumerated in the section. They are grantees from the Government. They get the full title of the grantor-Government The Settlement Officer has jurisdiction to decide this new statutory right as between the different claimants. This new right is a legislative boon conferred by the Act XXVI of 1963 on the cultivator.

Thus, the following is the scheme of the Act in reference to the three categories of agricultural land in the Inam estate, *viz.*, (1) the landholder's private lands under the Inam tenure, (2) the occupancy ryot's occupied ryoti land, (3) unoccupied ryoti lands, which are vested in the Government unconditionally under section 3 of the Act XXVI of 1963.

I. The landholder's pre-existing title to the private lands under Inam tenure as immediately before the notified date, as described in section 9 is recognised by the Act subject to the decision of the civil Court, in regard to internal disputes arising out of rival claims to the landholder's interest A three-tier hierarchy of Tribunals, *viz.*, the Settlement Officer, and the two Appellate Tribunals decide the issue of title to the lands under the statutory garb of title to ryotwari patta The decision is final and binding on the civil Courts The Appellate Judgments are also in the nature of judgments *in rem* Thus, the Settlement Officer's decision under section 12 (1) subject to the Appeals under the Act is conclusive evidence of landholder's title to the land subject to the decision of the civil Court on rival claims to the landholder's interest.

II The occupancy ryot's pre-existing title to his holding under the Inam tenure as immediately before the notified date as described in section 10 is recognised by the Act subject to the decisions of the civil Courts, in reference to internal disputes arising out of rival claims to the ryot's interest in the holding The Settlement Officer and the two Appellate Tribunals decide the issue of title to the land under the garb of title to ryotwari patta. The decision is final and binding on the civil Court.

1. (1947) 1 M L J 83 I L.R. 1947 Mad. 505.
2. (1959) 1 M L J 195
3. (1959) 1 M.L J 314.
4. (1961) 1 M L J 168
5. (1965) 2 M L.J. 204. I.L.R. (1966) 1 Mad. 109.

The appellate judgments are also judgments *in rem*. The Settlement Officer's decision subject to appeals under the Act is conclusive as to the ryot's title as against the landholder as well as the Government. But it is subject to the decision of the civil Court in reference to rival claims of the ryot's interest in the holding.

III The Act confers a legislative boon on three classes of cultivators of the unoccupied ryoti land in the estate as described in section 11. This is a new statutory right The Settlement Officer and the two Appellate Tribunals decide the issue of title of the respective grantees under the garb of title to ryotwari patta. The decision is final and binding on the civil Courts. The Appellate judgments are also judgments *in rem*

IV The remaining unoccupied agricultural lands vest in the Government.

Jurisdiction of the civil Court.

What is the extent of jurisdiction of the civil Court after the creation of the above hierarchy of Special Tribunals. The relevant Rule of Law is as follows:

I "It is now well recognised that where a right or liability is created by a Statute which gives a special remedy for enforcing it, the remedy provided by the Statute only must be availed of *Ponnuswami* v *Returning Officer, Namakkal*[1]."

II. When there is a liability existing at common law and that liability is enforced by a Statute which gives a special and peculiar form of remedy, different from the remedy which existed a common law, then, unless the Statute contains words, which expressly or by necessary implication exclude the common law remedy the party suing has his election, to pursue either that or "the statutory remedy" —Willes, J in *Wolverhampton New Water Works Company* v. *Hawkesford*[2]. Applying this Rule of Law to the statutory rights described in sections 9, 10 and 11, of the Act, the position is as follows:

(*a*) *Section* 9.—The landholder's right described in the section is a right created by the Act XXVI of 1963. The Act provides in sections 12 and 46 a hierarchy of Special Tribunals to decide in respect of which lands the claim of a landholder for a ryotwari patta under section 9 shall be allowed Section 71 enacts that the decision of the Tribunal shall not be liable to be questioned in a Court of Law. The right to ryotwari patta under this section is only another name or grab for title to the land. The hierarchy of Special Tribunals has thus exclusive jurisdiction to decide this issue of title to the lands. But the right which is thus decided is subject to the decision of the civil Court in reference to internal disputes as between rival claimants to the landholder's interest.

(*b*) *Section* 10—The ryot's right described in section 10 is a common law right modified by the Statute. The Act provides a remedy for this right through the

1. (1952) 1 M L J 775 at 796 (S C) (1952) S C J. 100.
2. (1859) 6 C.B (N S) 336 (356).

decision of the above Tribunal The Tribunal decides the issue of the ryot's title to his holding under the garb of title to ryotwari patta. The jurisdiction of the Tribunal is an exclusive one under section 71. But this is subject to the jurisdiction of the civil Court in respect of internal disputes arising out of rival claims of title to the ryot's occupancy right in the holding.

(*c*) *Section* 11.—The cultivator's legislative boon described in the section is a statutory right newly created by the Act The Act also provides a remedy for this new right through the above hierarchy of Special Tribunals. The jurisdiction of the Tribunal is exclusive.

The Act is an important piece of Land Reform legislation The question of title to the land under the new ryotwari tenure created by the Act is a crucial issue. The common law, both subjective and adjective, should be crystal clear. Unfortunately, it is not so. The legislative draftsman has left some loopholes in the relevant law. They are bound to promote litigation Such litigation will be seriously prejudicial to the Nation's Food Industry. An Amending Bill to rectify the defect is, therefore, necessary The requisite public opinion has to be created for the purpose.

SIXTEEN YEARS OF EXPERIENCE WITH THE LAW OF PREVENTIVE DETENTION IN INDIA—A RETROSPECT.

By

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Introduction

The law of preventive detention in India is curiously enunciated in the Chapter on "Fundamental Rights", Constitution of India, 1950. By its very nature, preventive detention is directed at the prevention of the commission of an offence or the achievement of a certain end by the detained person, the basis being "reasonable probability", not criminal conviction, which can only be justified by legal evidence"[1]. Article 21 of the Constitution lays down that a person shall not be deprived of his life or personal liberty, except according to the procedure established by law. This article is a guarantee against the deprivation of life or personal liberty of a person by the Executive and not by the Legislature. The Executive should always justify its action on the basis of procedure established by law. Even the Legislature has to conform to the limitations provided in Article 22 when it chooses to make law as to deprivation of life or personal liberty of a person. To the extent the procedure is prescribed by Article 22 the same is to be observed, otherwise Article 21 will apply[2].

I. Legislative approach to the personal liberty of an individual

By virtue of the legislative power conferred on the Parliament under Entry No. 9, List 1 and Entry No. 3 of List III, Sch. VII, Preventive Detention Act was passed on 25th February, 1950. This was to run for one year. But the life of the Act has been extended from time to time and it looks as if the Act has become a permanent part of the legal arsenal of the Indian Government for controlling incipent threats to law and order. "India's political leaders have gradually come to the realization that for them emergency is a way of life"[3].

The object of the Preventive Detention Act, 1950 spelt out in section 3 (1) (*a*) is to prevent any person from:— "acting in any manner prejudicial to

(1) the defence of India, the relations of India with foreign powers, or with the security of India, or,

(2) the security of the State or the maintenance of public order, or

(3) the maintenance of supplies and services to the community."

These terms and phrases are not only wide in scope, but also vague in their content. They have been left undefined in the Act. It has been the task of the judiciary to expound their content as and when they decide the legality of the detentions arising under the Act. The scheme of the Act which has been enacted within the bounds of the limitations contained in clauses (4) to (6) of Article 22 of the Constitution is as follows:—

The Central or the State Governments or the Subordinate authority[4] of a State could detain any person, provided that it "is satisfied" that the person to be detained is likely to engage himself in a manner—"*prejudicial*" to the interests contemplated. He should be informed of the grounds of his detention within five days from the date

1. *Lord Macmillan in Liversidge* v. *Anderson*, L.R. (1942) A.C. 206.

2. *Gopalan* v. *State of Madras*, (1950) S.C.R. 88: (1950) 2 M.L.J. 42: (1950) S.C.J. 174: A.I.R. 1950 S.C. 27.

3. *David H. Bayley*: "The Indian Experience with Preventive Detention." Pacific Affairs. Vol. 35, No. 2, Summer 1962 P. 99 (114).

4. District Magistrates, Additional District Magistrates specially empowered in this behalf by the State Government, the Commissioner of Police for Bombay, Madras, Calcutta or Hyderabad and the Collector of Hyderabad State could exercise such powers with respect to items (ii) and (iii).

of detention. When the detention order is issued by the State Government, the Central Government must be notified of it, "as soon as may be" The detention order made by the subordinate authority of a State will remain in force only for a period of twelve days In order to continue the order of detention beyond the period of twelve days, there should be an approval by the State Government within the said period If the State chose to approve the said order of detention, then it has to place the matter before an Advisory Board within 30 days from the date of detention Advisory Boards constituted by the Central as well as the State Government must consist of three members who are, or have been, or are qualified to be appointed as Judges of a High Court. The Chairman of the Advisory Board must either be or have been a High Court Judge The Board is empowered to collect any information relevant to determining the necessity for an order, subject to the restriction that information may be withheld which the Government considers not in the public interest to disclose. The detained person has not been given the right to be assisted by a legal practitioner. He can, however, make personal representations to the Board After considering the materials placed before it and the representations made to it by the detenue, the Board has to submit its reports to the appropriate Government within ten weeks from the date of detention Upto this point, the order of detention which has been approved by the Government will continue in force The periods during which the order of detention will continue by virtue of the earlier section would all come to an end after the Advisory Board sent its report to the Government The Government has then to decide finally, if the report states that there is sufficient cause for detention, whether it would continue the detention or release the person If the Government wants to continue the detention then it has to confirm the detention order and in that case, the Government can keep the person in detention for a maximum period of one year from the date of detention. When the Board has reported that there is in its opinion, no sufficient cause for the detention of the person concerned, the appropriate Government should revoke the detention order and cause the person to be released forthwith." From the fact that the interests contemplated in section 3 (1) (*a*) of the Act has been left undefined and also from the fact that the subordinate authority has been empowered to make an order of detention of any person, one will naturally draw the conclusion that the legislature is over zealous of protecting objects contemplated in the Act at the expense of the personal liberty of the individual even during the times of normaley.

II Judicial Approach to the Personal Liberty of the Individual

The first test case on personal liberty and preventive detention came up for consideration before the Supreme Court in *A. K Gopalan* v *State of Madras*[1] The petitioner a prominent Communist leader, relied strongly upon Article 21 in support of his contention that the Preventive Detention Act was *ultra vires* the powers of the Parliament as it abridged the right given by Article 21 to every person.[2] It was contended that the expression "procedure established by law" meant the same thing as due process as interpreted by the American Supreme Court and the word 'Law' meant 'jus' *i e*, law in the abstract sense of the principles of natural justice and not 'lex' the enacted law Rejecting all these contentions, the Court said

> " The omission of the word 'due', the limitation imposed by the word 'procedure' and the insertion of the word 'established' thus bring out more clearly the idea of legislative prescription by the expression in Article 21 By adopting the phrase 'procedure established by-law' the Constitution gave the legislature the final word to determine the law. ...."[1].

The Court further said that Article 197 of the Constitution read as a whole has no application to a legislation having preventive or punitive detention as its direct object

1 (1950) 2 M L J 42 . (1950) S C J, 174 (1950) S C R 88 A I,R 1950 S C. 27

2 By virtue of clauses (2) to (6), the Court could decide the reasonableness of the law made by the legislature restricting the exercise of the rights conferred by clause (1)

The Court also interpreted the term 'law' in Article 21 as meaning only statute law The above term also used in Article 31 (1)[1] in similar setting was interpreted to bear the same meaning Subsequently in the *Kochunnis case*[2] the Supreme Court modified its view and held that the word 'law' in clause (1) of Article 31 meant not just any statutory law but a valid law which should not violate other provisions of the Fundamental Rights Chapter In *Hamdard Dawakhana* v *Union of India*[3], the constitutionality of section 8[4] of the Act was challenged on the ground that it violated the petitioner's right under Articles 21 and 31[5] Upholding the contention, the Court said that the first portion of the impugned section which lacked the necessary safeguards, was an unreasonable restriction on the fundamental rights of the petitioners It is probable that the Court relied on the principles of natural justice in order to test the reasonableness of the impugned section It is true that this decision of the Supreme Court did not directly deal with preventive detention Yet it involved interpretation of Article 21 and the implications of this decision has greater and immediate, significance on the meaning given to the term 'law' occurring in Article 21 of the Constitution by the Supreme Court in *Gopalan's case*[6] It is unfortunate that the Supreme Court has not taken cue from this decision in determining the content of personal liberty guaranteed in Article 21 whenever the matter subsequently arose for consideration It is submitted here that the term 'law' in Article 21 has to be interpreted as the principles of natural justice and not as the statute law.

Be it as it may, the Supreme Court in *Gopalan's case*[6] held that Article 21 has to be read as supplemented by Article 22 and reading it that way, it is said the proper mode of construction will be that to the extent the procedure is prescribed by Article 22, the same is to be observed, otherwise Article 21 will apply The Court struck down section 14 of the Act as *ultra vires* Article 22 (5)[7] of the Constitution This section prevented the detenue from disclosing the grounds of his detention even to the Court Not only that even the Court was prevented from calling upon any public officer to disclose the substance of the grounds of detention The "satisfaction" clause of section 3 was interpreted to mean the subjective satisfaction of the detaining authority and it was held that the reasonableness of the satisfaction cannot be enquired into by the Court The Supreme Court in this case purported to follow the majority decision in *Liversidge* v *Anderson*[8], but it can be said to have done only to the extent that its decision involved the interpretation of a written statute The Court may be said to have differed from the English rule to the extent that it applied the emergency rule of the preventive detention to a non-emergency case in India[9]

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1 Article 31 (1) "No person shall be deprived of his property save by authority of law"

2 A I R 1960 S C 1080

3 (1960) S C J 611 (1960) 2 S C R 671 (1960) 1 M L J (S C) 1 (1960) 1 An W R (S C) 1 (1960) M L J (Crl) 358 A I R 1960 S C 554

4. S 8 Any person authorized by the State Government in this behalf may, at any time, seize and detain any document, article or thing which such person has reason to believe contains any advertisement which contravenes any of the provisions of this Act and the Court trying such contravention may direct that such document (including all copies thereof) article or thing shall be forfeited to the Court

5 It was contended that there was no limitation placed, no rules and regulations made for and no safeguard provided in regard to the powers of a person authorised in that behalf by the Government to seize and detain any document, article or anything which in the opinion of such authority contains such advertisement contravening any of the provisions of the Act

6 (1950) S C R 88 (1950) 2 M L J 42 (1950) S C J 174 A I R. 1950 S C. 27.

7 "Article 22 (5) when any person is detained in pursuance of an order made under any law providing for preventive detention, the authority making the order shall, as soon as may be, communicate to such person the grounds on which the order has been made and shall afford him the earliest opportunity of making a representation against the order"

8 L R (1942) A C 206

9 See Prof Alexandrowiz, Constitutional Developments in India, Oxford University Press, p. 28.

III The Subordinate authority and his duties

Before the Government can pass an order of preventive detention, it must be satisfied with respect to any person that with a view to prevent him from acting in any manner prejudicial to (i) the defence of India, the relations of India with foreign powers, or the security of India, or (ii) the security of the State or the maintenance of public order, or (iii) the maintenance of supplies and services essential to the community, it is necessary to detain him. It should be noted here that while in the worst days of war when England was fighting with her back to the wall, the emergency legislation in the United Kingdom enabled the Home Secretary to detain persons without trial after applying his mind to each case and being satisfied that the person whom he intended to detain was guilty of a prejudicial act, the Indian law has delegated to the subordinate officers of the State to exercise such a power[1] and that too during normal times Yet, the legislature in its wisdom has provided for certain safeguards by requiring the subordinate authority to immediately report to the State Government, the grounds and the particulars on which the order was passed It has been held that non-service of detention order simultaneously with the arrest does not necessarily render the arrest illegal[2]. When the detenue is not given the copy of the order of detention, detention becomes illegal[3]. An order would not be a good order if made by some officer not contemplated under section 2[4] An order made by a Deputy Commissioner as such and not as a District Magistrate is without jurisdiction, even if the order states that it was being made under section 3 (1) (*a*) (iii) of the Act, and the doctrine of presumption of regularity cannot be invoked for presuming that the Deputy Commissioner acted in his capacity as a District Magistrate [5]

IV Definition of the interests contemplated in the Act.

In the absence of any definition of the interests referred to in section 3 (1) (*a*), the Court has the power to decide what those interests meant It has been held that carrying on propaganda against the Government of India and the Government of the State in such a manner as to bring these two Governments into hatred and contempt would involve the security of India[6] Sending for publicaton in a foreign newspaper despatches of news and views relating to the State containing false, incomplete one-sided and misleading information about the policy of the Government of India in relation to any State and about the conditions in India in general and keeping touch with several persons who are hostile to the cause of India would all cumulatively affect the relations of India with foreign powers and also the maintenance of public order [6] Possessing official secrets connected with the security of India and having a bearing on relations of India with foreign powers and maintaining unauthorised and clandestine communication with an agent of foreign power for the purpose of disclosing the official secrets will also prejudicially affect the above interests[7] Getting financial help from a hostile power in order to carry on espionage-activities on behalf of that power, with the help of underground workers, collection of intelligence about the security arrangements on the border area and making available to the hostile

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1. Except the interest mentioned in item (i)

2 Per Raghava Rao, J., In re *A K Gopalan,* (1952) 2 M L J 690 · 54 Cr L J 224 (Mad) at p 232 A I R 1953 Mad 41

3 *Thiruvadinath* v *District Magistrate,* (1951) 52 Cr L J 845 (Tra-Cochin) A I R 1951 T C. 130

4 *Dhanpatrai* v *State of W B*, (1954) 55 Crl L J 1496 (Cal) A I R 1954 Cal 518

5 When an order is made by the State Government, it is appropriate that an order of detention should set out that the " Government of the State was satisfied " and that " the Government directed the detention It is also proper that the order should have been executed under the orders of the Governor authenticated by the signature of the Secretary " *State of Bombay* v *P J Naick,* (1952) 2 M L J 338 (1952) S C J 503 A I R 1952 S C 317.

6 *Jagan Nath Sathu* v *Union of India,* (1960) S C J 975 (1960) (M L J Crl) 671 A I R. 1960 S C 625.

7 *Prakash Chandra* v *Union of India,* (1965) 2 Cri L J 119 (Punjab) A I R. 1965 Punj 270.

made[1] By their very nature the grounds are conclusions of facts and not a complete detailed recital of all the facts The conclusions drawn from the available facts will show in which of the three categories of the prejudicial acts the suspected activity of the particular person is considered to fall These conclusions are 'grounds' and they must be supplied No part of such ground can be held back[2] nor can any more 'grounds' be added thereto What must be supplied are the 'grounds on which the order has been made' and nothing less. The second right of being afforded the 'earliest opportunity of making a representation against the order is not confined to only a physical opportunity by supplying paper and pen In order that a representation can be made the person detained must first have knowledge of the grounds[3] on which the authorities conveyed that they were satisfied about the necessity of making the detention order. It is therefore clear that if the representation has to be intelligible to meet the charges contained in the grounds, the information conveyed to the detained person must be sufficient to attain that object It thus appears clear that although both these rights are separate and are to be exercised at different times, they are still connected with each other Without getting information sufficient to make a representation against the order of detention it is not possible for the man to make the representation Indeed, the right will be only illusory but not a real right at all If the later communication contains facts leading to a conclusion which is outside the ground first supplied, the same cannot be looked into as supporting the order of detention and therefore those grounds are 'new' grounds[4] The question whether the vagueness or indefinite nature of the statement furnished to the detained person is such as to give him the earliest opportunity to make a representation to the authority is a matter within the jurisdiction of the Court's enquiry and subject to the Court's decision.[5] The conferment of the right to make a representation necessarily carries with it the obligation on the part of the detaining authority to furnish the grounds *i e*, materials on which the detention order was made[6] In our opinion, it is therefore clear that while there is a connection between the obligation on the part of the detaining authority to furnish grounds and the right given to the detained person to have an earliest opportunity to make the representation, the test to be applied in respect of the contents of the grounds for the two purposes

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1 *In Bal Keshav* v *Commissioner of Police*, (1956) 57 Crl L J 875 (Bom), A I R 1956 Bom 490 the important ground supplied to the detenue was that he made an inflammatory speech on 16th November, 1955 and that the effect of the speech was that serious trouble had broken out in Bombay on 21st November, 1965 But this important ground turned out to be a false ground, because on 16th November, the detenue, an old man of 72, was laid up in his bed due to serious eye trouble He was so incapacitated that he would not possibly have attended the meeting This ground was not in existence when the order of detention was made Detention was held illegal

2 (1959) 60 Crl L J 63 (Mysore) *See* foot-note 7 at page 30

3 When the grounds supplied to the detenu are not in the language known to the detenue and particularly when no attempt has been made to explain to the detenue the content of the grounds in the language known to him, it cannot be said that he had the knowledge of the grounds furnished to him.

4 A description of the content of the second communication as "supplementary grounds" does not necessarily make them additional or new grounds *Tarapade De* v *The State of West Bengal*, (1951) S C J 233 (1951) 1 M L J 431.

5 "Tne Supreme Court has engaged (here) in a strictly literal interpretation of Article 22 (5) in order to get a grip on *habeas corpus* cases which it had lost by a literal interpretation of Article 21 The insistence on the sanctity of the representation and the defence of the detenus was in fact the only constitutional safeguard which enabled the judges to oppose detention orders with insufficient grounds and details" C H Alexandrowicz 'Constitutional Developments in India' (Oxford University Press) 1957, p 33

6 On the other hand, the obligation and the necessity for the second communication would arise only if the detenue, feeling the grounds to be vague, asks for more particulars *Lawrence Joachim Joseph D'Souza* v. *The State of Bombay*, (1956) S C R 382 at p. 392 (1956) S.C J 559.

is quite different [1] As already pointed out for the first, the test is whether it is sufficient to satisfy the authority[2]. For the second, the test is, whether it is sufficient to enable the detained person to make the representation at the earliest opportunity The contention that the grounds are vague requires some clarification. If the ground which is supplied is incapable of being understood or defined with sufficient certainty, it can be called vague. The only argument which could be urged is that the language used in specifying the ground is so general that it does not permit the detained person to legitimately meet the charge against him because the only answer he can make is to say that he did not act. In certain cases that argument may support the contention that having regard to the general language used in the ground he has not been given the earliest opportunity to make a representation against the order of detention *It cannot be disputed that representation mentioned in the second part of Article 22 (5) must be one which on being considered may give relief to the detained person* "[3].

Whether a ground is vague or not would, however, depend on the circumstances of each case When the ground alleged was that the detenue attended the secret meetings of the Communist Party in order to give effect to the programme of preparing the people for violent revolutionery campaign[4], it cannot be said that the ground is capable of being understood with sufficient certainty The following grounds, *viz.* that the detenue tried to create public disorder amongst tenants by circulating and distributing objectionable literature issued by underground Communists,[5] that the detenue a member of the Communist party was likely to go underground in order to further the plans of the Communist party, *viz* ,commission of sabotage and violence,[6] that the detenue was " of a desperate character" whose political creed was Communism[7], that the local reputation of the detenue, a smuggler and profiteer was bad[8] and that the detenue, along with her associates had been collecting and was likely to collect arms and ammunitions illegally for illegal purposes and illegal activities,[9] have all been held to be vague In *Ram Krishna's case*[10], it was held that the constitutional requirement that the grounds must not be vague must be satisfied with respect to each of the grounds communicated to the person detained subject to the claim of privilege under clause (6) of Article 22 of the Constitution The ground which recited that the detenue had been organising the movement (Praja Parished Movement) by enrolling volunteers among the refugees in his capacity as President of the Refugee Association of Bara Hindus Rao was held to be vague and the Supreme Court said that even though the other grounds were not vague the detention was not in accord-

(*to be continued*)

1 The Supreme Court in *Tarapada De* v *State of W B*, (1951) S C J 233 (1951) S C R 212 (1951) 1 M L J 431 A I R 1951 S C 174 at p 177, refused to accept the contention that the quality and characteristic of the grounds should be the same for both tests

2 " The sufficiency of the grounds, which gives rise to the satisfaction of the Provincial Government is not a matter for examination by the Court, (1951) S C J 233 (1951) S C R 212 (1951) 1 M L J 431 . A I R 1951 S C 174 at p 176

3 Italics mine.

4 *Ujagar Singh* v *State of Punjab*, (1950-51) C C 154 p 156

5 *Ibid.*

6 *Kulomoni* v *The State*, A I R 1950 Orissa 20

7 *Ananta* v *State*, A I R 1951 Orissa 27.

8 *Ramanlal* v *Commissioner of Police*, A I R 1952 Cal 26

9 *Sushila* v *Commissioner of Police, Greater Bomnay*, (1951) 52 Cri L J 437 (Bom) A I R. 1951 Bom 252 The grounds were held to be vague because, there was no mention of either time when or the place where or the purpose or activities for which the arms were collected

10 *Dr Rama Krishnan Bhardwaj* v *State of Delhi*, (1953) S C J 444 (1953) S C R 708 A.I R 1953 S C 318.

ance with the procedure established by law[1]. From the catena of cases[2] decided by the Courts, it is clear that vagueness of even one of the grounds can be the cause of invalidation of detention orders. It is, therefore, not permissible to a detaining authority to issue an order of detention mechanically incorporating the words of section 3 [3] It is the duty of the detaining authority to formulate the statement of grounds against the detention in a precise manner and the authority should avoid undue prolixity in the drawing up of the ground so that unnecessary complications are avoided[4].

In *D'Souza's case*[5], the Supreme Court held that the necessity of a second communication would arise only if the detenue, feeling the grounds to be vague asks for particulars It further held that in the absence of any such request by the detenue the non-communication of the decision cannot be held to have hampered his constitutional right of representation and that an obligation to communicate cannot be implied in these circumstances On the other hand in *Atma Ram's case*[6], the Supreme Court held that by virtue of clause (5) of Article 22, the detenue is entitled in addition to the right to have the ground of his detention communicated to him to a further right to have particulars as full and adequate as the circumstances permit furnished to him to enable him to make a representation against the order of detention and that the sufficiency of particulars conveyed in the second communication is a justiciable issue. Could these decisions of the Supreme Court be reconciled ? The answer is in the affimative The explanation lies in the fact that while in *Atma Ram's case*[6] the Court laid down the objective test for determining the justiciability of the particulars supplied to the detenue, in the former case the Court laid down how the objective test has to be applied to the facts of the case before it, despite the non-communication of particulars to the detenue. In *D'Souza's case*[5] the detenue was alleged to have indulged in espionage activities having direct bearing on the security of India. The detenue was a practising lawyer who might have been aware of the nature and consequence of the activities he was engaging in The grounds supplied to him did not mechanically recite that he indulged in activities prejudicial to one or other interests mentioned in section 3. The allegations contained in the grounds were definite and not vague As a lawyer, he ought to have foreseen that the particulars

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1 Following this case, it was held in *Bakhtawar Singh* v *State of Pepsu*, (1953) 54 Cri L J. 1838 (Pepsu) A I R 1953 Pepsu 207 that all the grounds supplied to the detenue must be clear and specific and that even if one of them does not satisfy that condition, the right of representation guaranteed under Article 22 (5) was affected and consequently the order of detention became illegal.

2 (1) *Prem Dutta* v *Supdt*, *Central Prison*, (1954) 55 Crl L J 685 (All) A I.R. 1954 All 315

(2) *Durg Singh* v *State*, (1953) 54 Cri L J 1424 (Raj) A I R 1953 Raj 177

(3) *Jangir Singh* v *State of Pepsu*, (1953) 54 Cri L J 1710 (Pepsu) · A I R 1953 Pepsu 190. It was held in this case that where the ground of detention supplied to the detenue merely stated that the detenue was constantly engaged in doing something in a manner prejudicial to public peace, without telling him anything further, it fell short of the requirements of law and that the ground was vague

(4) *Prakash* v *State of M B* , (1953) 54 Cri L J 982 (M B) A I R 1953 M B 153

(5) *Devi Singh* v *State of Rajasthan*, (1953) 54 Cri L J 34 (Raj) A I R. 1952 Raj 171.

(6) *Panna Ram* v *State*, (1954) 55 Cri L J 940 (Punjab) A I R 1954 Punj 133 The ground that all murderers and all ' badmashes ' not only of Punjab but from Pepsu and Rajasthan meet at the places of detenue and that he and members of his party are ' schemers ' and do no cultivation themselves, is much too a ground and does not comply with the fundamental right of the detenue under clause (5) of Article 22 of the Constitution

(7) *Wahid Ali* v *State of Bhopal*, (1952) 53 Cri L J 683 (Bhopal). A I R 1952 Bhopal 6 Merely stating in the grounds for detention that the detenue was responsible for strikes amongst labourers without mentioning whether they were legal or illegal is not a ground of such precision or adequacy as to enable the detenue to make a representation against the order of detention

(8) *Jusab Alarkha* v *State*, A I R 1951 Sau 13 A ground of detention stating that the detenue used to meet certain decoit whenever he came to the detenue's village is absolutely vague and indefinite

3 *Devi Singh* v *State of Rajasthan*, (1953) 54 Crl L J 34 (Raj) at p 41 A I R 1952 Raj 171

4 *Mool Singh* v *State*, (1958) 59 Crl L J 962 (Raj) at p 965 A I R 1958 Raj 158

5 (1956) S C J 559 · (1956) S C R 382 A I R 1956 S C 531

6. (1951) 1 M L J 389 : (1951) S C J 208 (1951) S C R. 167 . A I R 1951 S.C 157.

regarding his activities had direct bearing on the public interest and would, therefore, be withheld The Supreme Court, therefore, rightly observed that if the appellant had exercised his right to ask for particulars from the detaining authority, there can be no doubt that he would have been furnished then the very information claiming privilege of non-disclosure contained in the affidavit of the Under Secretary of the State In fact, the Supreme Court has gone a step further in *Ram Krishan's case*[1], in upholding the right of representation constitutionally vested in the detenue To the argument of the Advocate-General to the effect that the ground which had been seriously contended to be vague, must be read with other grounds and if so read, that ground could reasonably be taken to mean, that the petitioner was organising the movement by enrolling volunteers in the area known as Bara Hindu Rao, the Court said that such interpretation is plausible. But it said " The petitioner is a layman not experienced in the interpretation of documents, can hardly be expected without legal aid, which is denied to him to interpret the ground in the sense explained by the Advocate-General Surely, it is up to the detaining authority to make his meaning clear beyond doubt, without leaving the person detained to his own resources for interpreting the ground "[2] Therefore, it is not correct to say that the Supreme Court in later decisions restricted the right of representation enjoyed by virtue of the earlier decision of the same Court [3]

By clause (6) of Article 22, the authority making an order of preventive detention has a discretion not to disclose facts at the time when he informs the grounds which he considers to be against the public interest to disclose This system has been criticised on the ground that the " sole hold permitted the Courts by the constitution over the operation of the Preventive Detention Act is, ultimately, subject to the discretion of the Executive "[4] This criticism obviously ignores the observation made by the Chief Justice in *Atma Ram's case*[5] " While the Constitution gives the Government the privilege of not disclosing in public interest facts which it considers undesirable to disclose, by the words in Article 22 (5), there is a clear obligation to convey to the detained person materials (and the disclosure of which is not necessary to be withheld) which will enable him to make a representation "[6]. From this it is clear that the Court can interfere on the ground that what has been stated is insufficient for making a representation The discretion does not extend to those facts which are considered not desirable to be disclosed in the public interest The protection under clause (6), however, is not available unless it is stated in the communication that it is not in the public interest to give the particulars which are withheld[7] *Sushila* v *Commissioner of Police, Greater Bombay*[8], exemplifies the observations made by the Supreme Court in *Atma Ram's case*[5] In this case, the grounds furnished to the detenu were "That you along with your associates have been collecting and are likely to collect arms and ammunitions illegally for illegal purposes and

1 (1953) S C J 444 (1953) S C R 708 A I R 1953 S C 318

2. *Ibid* at p 712

3 In this respect the present writer choose to differ from the view taken by the learned constitutional author Basu He wrote " It is whittling down the constitutional guarantee if the Court now holds *i e*, in (1956) S C R 382 (390) (1956) S C J 559 A I R 1956 S C 531 that whatever the fault of the detaining authority in complying with the requirement of clause (5) the detenue would be precluded from relying upon his constitutional right if he does not ask for further particulars when the grounds were communicated to him " See Basu's commentary on the Constitution of India, IV Edn, Vol 2 at p 126

4 David M Baily, op cit at p 102

5 (1951) 1 M L J 389 · (1951) S C J 208 (1951) S C R 167 A I R 1951 S C 157

6 (1951) S C J 208 (1951) S C R 167 (1951) 1 M L J 389 · A I R 1951 S C 157 at p 164

7 *Nityananda* v *Chief Secretary*, (S C Petns 206 and 238 etc of 1951), *Iswar Das* v *The State* (S C Petn 34 of 1950) quoted by Durga Das Basu, Commentary on the Constitution of India, III Edn Vol 1, p 309 When an order is made by the State Government, it is appropriate that an order of detention should set out that the " Government of the State was satisfied " and that " the Government directed the detention It is also proper that the order should have been executed under the orders of the Governor authenticated by the signature of the Secretary *State of Bombay* v *P J Naick*, (1952) 2 M L J 338 (1952) S C J 503 A I R 1952 S C. 317.

8. (1951) 52 Cri.L.J. 437 (Bom) . A.I.R. 1951 Bom. 252.

illegal activities." The Court held that the grounds given were not such as to enable the detenue to make a proper representation As the facts were not withheld on the ground of public interest, the detention was illegal The Court also said that the exercise of the discretion vested in the detaining authority by sub-clause may be challenged on the ground that the discretion has been exercised arbitrarily, capriciously or *mala fide*[1]

VI Statutory rights of the detenue

Apart from the constitutional rights, what are all the statutory rights which the detenu enjoys by virtue of the Preventive Detention Act ? Section 7 of the Act, as such, incorporates all the constitutional rights vested in the detenu under clauses (5) and (6) of Article 22 of the Constitution[2] The legislation being preventive and not punitive, the question that naturally arises is to what extent the authority making the order of preventive detention can have resort to it Before proceeding for consideration of this aspect of the question, it is necessary to bear in mind the observation of Patanjali Sastri, J, (as he then was) made with respect to Article 22 (3) to (7) of the Constitution "This sinister looking feature, so strangely out of place in democratic constitution which invests personal liberty with sacrosanctity of a fundamental rights and so incompatible with the promise of its preamble is doubtless designed to prevent an abuse of freedom by anti-social and subversive elements which might imperil the national welfare of the infant Republic"[3] Chapter VIII of the Code of Criminal Procedure, Act V of 1898 which also provides for preventive detention is part of the law of the land and it has for a long time been part of the general law of Criminal Procedure in this country. The primary purpose of the proceedings under Chapter VIII is to take security from potential criminals for keeping the peace or for good behaviour after a judicial inquiry, while the primary object of the preventive detention made under section 3 of the Preventive Detention Act, 1950, is to imprison a person by the executive action without judicial enquiry Thus it is evident that these two acts do not overlap and in fact, supplement each other[4] From the decisions[5] of the various High Courts it is well-established that the authorities cannot have resort to the drastic action of

1 (1951) 52 Cri L J 437 (Bom) at p 439 A I R 1951 Bom 252.

2 The validity of the Act was challenged before the Supreme Court but the challenge failed and the Act as a whole was upheld in *Krishnan* v *State of Madras*, (1951) S C J 463 (1951) 2 M L J 105 (1951) S C R 621 A I R 1951 S C 301

3 (1950) S C J 174 (1950) 2 M L J 42 (1950) S C R 88 A I R 1950 S C 27

4 If anything, they are complementary, *Ramanlal* v *Commissioner of Police*, (1952) 53 Crl L J 204 (Cal) A I R 1952 Cal 26

5 (1) *Prakash Chandra* v *Union of India*, 1965 (2) Cr L J 119 (Punj) A I R 1965 Punj 270

(2) *Man Singh* v *State*, (1953) 54 Crl L J 120 (Pepsu) A I R 1953 Pep 16

(3) *Muthuramalinga* v *State*, I L R (1958) Mad 692 (1958) M L J (Crl) 607 (1958) 2 M L J 169 (1952) 59 Crl L J 1047 (Mad) A I R 1958 Mad 425

(4) *Ratanlal Gupta* v *Dist Magistrate*, (1952) 53 Cr L J 1039 A I R 1952 Orissa 52 (Orissa) The detention order under section 3 in cases where the prosecution is pending or imminent (in respect of the grounds supplied) is a serious step for the executive authorities to take *Ibid*

(5) *Bakthawar Singh* v *State*, A I R 1951 Simla 157 In cases where offences like smuggling are involved with which the maintenance of public order and safety of the State are very remotely connected, the recourse to preventive detention must be regarded as complete confession of inefficiency on the part of the local authorities, *ibid*

(6) *Koshi Nath Gupta* v *The State*, A I R 1951 Madhya Bharat 56

"A person cannot be detained under the Act for what he has already done "

(7) *Ravinder Kumar* v *Dist Magistrate*, (1960) 61 Crl L J 981 (Punj) A I R 1960 Punj 332. If the local police is helpless in securing conviction successfully with regard to a person who is committing thefts etc , it does not mean that resort can be had to the provisions of the Preventive Detention Act in normal conditions unless special circumstances exist .. "

(8) *Abdul Aziz* v *The State*, (1954) 55 Cri L J 747 (Assam) A I R 1954 Assam 93

(9) *Haridas* v *State*, (1952) 53 Crl L J 1670 (Assam) A I R 1952 Assam 175

(10) *Baboo Ram* v *The State*, (1952) 53 Crl L J 3 (All) A I R 1951 All 838 It is not open to the detaining authority to punish a man for the same act which could only have constituted the basis for prosecution, *Ibid*.

preventive detention where prosecution under the provisions of the ordinary criminal law was open to them One exemption is well-recognised in cases where the person sought to be detained preventively acts prejudicially to the "maintenance of supplies and services essential to the community"[1] If the grounds, of detention were not wholly the same as the facts in respect of which a prosecution was launched, the fact that there are parallel proceedings in existence one in Court and the other by way of detention, does not by itself vitiate the order of detention[2] If a person who is already in detention in pursuance of his being accused of a non-bailable offence, is not in a position to act in a manner prejudicial to the maintenance of public order and therefore, no order of detention under section 3 could be passed against him[3] Similarly, where a person is detained in prison upon criminal charges as an under-trial prisoner, no order of detention under that section can be passed against him[4] Thus, the double detention falls outside the purview of section 3 (1) (*a*) of the Act[5] However, once an order for his release was passed by way of a discharge or by granting bail, the very circumstance that he is free to act would justify the making of the order of preventive detention, provided the necessary elements for satisfaction is present[6] A State cannot, for the purpose of the Preventive Detention Act, 1950 pass orders for detaining a person found within its territory for his activities outside the State or direct that such a person be detained outside that State[7] An order of detention issued for the purpose of flouting the decision of Court is void[8] When the legality of the detention is under the scrutiny of the Court, the action of the Government in revoking the previous order of detention in order to make a fresh order of detention in a valid form based on pre-existing grounds themselves, is in accordance with law[9] Where however, the Government passes an order before the judgment is delivered and alleges that they passed the order because they anticipated the judgment to declare the prior order invalid on the technical ground that it did not mention the period of detention when they had no justification for such belief and even fresh order omits to rectify the defect, the circumstances leave no doubt that the intention of the Government was to flout the decision of the Court.[10]

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1 (*a*) *Gunoor Chandra* v *The State of Hyderabad*, A I R 1951 Hyd 94 "Where the facts alleged against a person are that he has contravened the provisions of section 3, Essential Supplies (Temporary Powers) Act, 1946, he can either be detained under the preventive measures or prosecuted in a Court of law"

2 (1) *Thakur Prasad* v *State of Bihar*, (1955) S C J 669 (1955) 2 M L.J (S C) 165 : A I R 1955 S C 631

(2) *Priyatosh Mayundar* v *State of W B*, 1963 (2) Crl L J 499 (W B) A I R 1963 Cal. 589

(3) *Maqdoom* v *State of Hyderabad*, (1952) 53 Cri L J. 1076 (Hyd) A I R 1952 Hyd. 112.

3 A I R 1951 Assam 43

4 (1) *Haridas* v *State*, (1952) 53 Cr L J 1670 (Assam) A I R 1952 Assam 175

(2) *Ananda Sankar* v *Govt of W B*, (1953) 54 Crl L J 361 (Cal) · A I R 1953 Cal 129

(3) *Abdul Aziz* v *The State*, (1954) 55 Crl L J 747 (Assam) A I R 1954 Assam 93

(4) In case the grounds of detention are not wholly the same and the Govt decides to drop the criminal proceedings in respect of a person already in custody under the ordinary criminal law, the Govt can make an order of detention against such a person

5. *Rameshwar* v *Dist Magistrate*, A I R 1964 S C 334.

6 (1) *Ananda Sankar* v *Govt of W B*, (1953) 54 Crl L J 361 (Cal) : A I R 1953 Cal 129

(2) *Sahadat Ali* v *State of Assam*, (1953) 54 Crl L J 770 (Assam) : A I R 1953 Assam 97.

7 *Mohan Kumaramangalam* v *State*, (1951) M W N 81 (1951) 1 M L J 174 . A I R 1951 Mad. 583.

8 In re *Gopalan*, (1953) 54 Crl L J 224 · (1952) 2 M L J 690 : A I R 1953 Mad 411 It would clearly be contempt of Court for any official to pass an illegal order of detention and on the basis thereof to decline to give effect to an order of release passed by the Court, however *bona fide* the action of the said official may be, *State* v *Somanath*, (1953) 54 Crl L J 349 (Orissa) A I R 1953 Orissa 33 In *V S Sundaram* v *L A Singh*, (1956) 57 Crl L J 1411 (Manipur), A I R 1956 Manipur 44 the Court held that the people who were responsible for the re-arrest of a person under the Preventive Detention Act on grounds which had been held to be illegal on that very day, should invariably be committed for the contempt of Court

9 *Naranjan Singh* v *State of Punjab*, (1952) S C J 111 (1952) 1 M L J 733 · A I R 1952 S C 106.

10 In re *Gopalan*, (1953) 54 Cri L J 224 (1952) 2 M L.J 690 A I R 1953 Mad 41 Per Raghava Rao, J. p. 233.

For the exercise of power under section 3, it is not necessary that the person concerned should be on his way to commit act or acts prejudicial to any of the interests Thus instances of past activities are relevant to be considered in giving rise to the subjective mental conviction of the authority that the person to be detained was likely to indulge in objectionable activities [1] The past conduct or antecedent history of a person can be taken into account when making a detention order, and, as a matter of fact, it is largely from prior events showing the tendencies or inclinations of the man that an inference could be drawn whether he is likely in the future to act in a manner prejudicial to the interests specified in section 3 of the Act.[2] The distance of time is immaterial unless there is practically no connection between the past and the present activities.[3]

An order of detention cannot be made on the basis of irrelevant grounds which are not at all relevant to the object of the legislation 'Blackmarketing' has no proximate connection with the maintenance of public order[4] and so also the act of smuggling [5] Contempt of Court, despite its serious nature, cannot have any rational connection with the security of the State or maintenance of public order.[6] The fact that the detenu was once detained as a security prisoner has no rational probative value and is wholly irrelevant to the maintenance of public order or security of the State.[7] Even if one of the several grounds supplied to the detenu be irrelevant, the detention becomes illegal.[8] It is open to the detenu to urge the ground of irrelevance before the Supreme Court, even if he had failed to do so before the High Court.[9]

An order of detention could only be made when the authority or the Government exercises the power under section 3 of the Act *bona fide* for the purpose of securing the object of legislation. The misuse of statutory power either *bona fide* or *mala fide* would result in the invalidation of the order of detention[10]. On the question of *mala fides* it is not a relevant consideration whether the activities of the detenu were liked or disliked by the authorities concerned. The only relevant consideration is if the order of detention was made for ulterior purpose or purposes other than those mentioned in the detention order [11] When the grounds justified the detention of the petitioner, it cannot be said that it was a case of satisfaction on the part of the detaining authority "patently simulated"[12] *mala fides* must be made out against the detaining authority and not against the police[13] A detention order issued for the purpose of flouting the decision of the Court, holding the previous order of detention invalid on merits, would be a *mala fide* order[14]. An order of detention made with the object of making a secret investigation into a crime, in contravention of the provisions of the Criminal Procedure Code in an instance of *mala fide* exercise of power.[15] Where an order of preventive detention was made for a collateral pur-

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1 *Bhim Sen* v *The State of Punjab*, (1951) S C J 747 · (1951) 2 M L J 641, A I R 1951 S C. 481

2 *Ujagar Singh* v *State of Punjab*, (1952) S C J 521 at 524 · (1952) 2 M L J 641 A I R. 1952 S C 350 *Narayana Raju* v. *Govt of Madras*, (1951) M W N 248 A I R 1951 Mad 182 : (1951) 1 M LJ 274

3 *S Salehuddin* v *State of A P*, (1959) 60 Crl L J 160 (A P) A I R 1959 A P 73

4. *Sodhi Shamser* v *State of Pepsu*, A I R 1954 S C 276

5 A I R 1951 Simla 157

6 *Rex* v *Basudeva*, (1950) 5 D L R 56 (F C)

7 *Sitaram Kishore* v *State of Bihar*, (1956) 57 Crl L J 86 (Pat) A I R 1956 Pat 1

8 *Gurbux Singh* v *State*, (1952) 53 Crl L J 1485 (Pepsu) A I R 1952 Pep 126 *Mohd Ishaq* v *U P State*, (1957) 58 Crl L J 1361 (All) at p 1371 A I R 1957 All 782

9 *Naresh Chandra* v *State of W B*, (1960) S C J 303 (1960) 1 S C R 411 1960 M L J. (Crl) 200 A I R 1959 S C 1335 at p 1342

10 (1958) 59 Crl L J 1047 (Mad) at p 1050 A I R 1958 Mad 425

11 *Puranlal Lakshanpal* v *Union of India*, (1958) S C J 510 (1958) M L J (Crl) 427 . A I R 1958 S C 163 (1958) S C R 460

12 *Ashutosh Lahiri* v *State of Delhi*, (1950) S C J 433 at p 435

13 *D' Souza* v *State of Bombay*, (1956) S C R 382 (1956) S C J 539 A I R 1956 S C 531.

14 In re *A K Gopalan*, (1953) 54 Cri L J 224 (Mad) at p 233 A I R 1953 Mad 41.

15 *Vimlabai* v *Emperor*, I L R (1945) Nag 6

pose *i e.*, either to punish the detenu for his past acts or to prejudice his defence in the pending case, the order becomes illegal by virtue of the *mala fide* exercise of power [1]

The Preventive Detention Act, 1950, being the existing procedure established by law, it must be followed strictly By virtue of the rules framed under Article 166 (3) of the Constitution, with respect to the allocation of business of the Government, the satisfaction required under section 3 as regards detention cases is the satisfaction of the Minister-in-charge of Home Department and not that of the Home Secretary and subsequent approval of the Minister concerned will not make the order of detention legal[2] A verbal communication of the grounds of detention is not according to the procedure established by law [3] Detention of a person becomes illegal, if he is not furnished with the grounds of his detention 'as soon as may be' or within 5 days from the date of detention [4] The illegality of the arrest will not *per se* make the order of detention invalid [5] The provision requiring the subordinate officer to report to the Government the grounds on which the order has been made and other particulars is to enable the Government itself and presumably the Minister in charge of the portfolios to apply his mind to the action taken by a subordinate authority and a non-compliance with this provision would result in the detention being held invalid [6] An order passed by the Magistrate under section 3 of the Act should not specify the period for which the person is to be detained [7] The satisfaction required under section 3 of the Act being, real satisfaction, it is necessary that the mind of the authority should run with the pen at the time when he makes an order of detention on the basis of the materials supplied to him His approach to the matter should not be a casual one He should be reasonably satisfied It is therefore, not permissible to him to issue an order of detention mechnically incorporating the words of section 3 In grave cases of detention without trial, it would not do to pass routine orders,without arriving at the mental satisfaction "When the orders of detention are made for several reasons without distinguishing between them, there is a reasonable doubt as to whether the detaining authority was resonably satisfied that the materials placed before it were sufficient for making a detention order, because, it canot be said which of the reasons principally influenced the detaining authority in making the detention order. It is not permissible to recite all, or more than one object given in section 3 in the order of detention and when it was shown by the grounds that they have no bearing upon some of those objects it is not permissible to fall back upon the argument that they have at least bearing upon one or more of those objects "[8]

By section 3 (3) of the Act, no order made by the subordinate authority can remain in force for more than 12 days after the making thereof, unless in the meantime it has been approved by the State Government What are the requirements of approval under section 3 (3)? Here it is necessary to note the difference in the language used in section 3 (1) and section 3 (3) of the Act Whereas at the time of detention the detaining authority has to be satisfied about the prejudicial activities of the person sought to be detained, but when the matter comes before the State Government under section 3 (3), it is not mere satisfaction, it is approval that is required [9] A mere

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1 *Ishar Singh* v *The State*, A I R 1953 Pepsu 111

2 *State* v *Somanath*, (1953) 54 Crl L J 349 (Orissa) at p 355 A I R 1953 Ori 33 *See also Shyamaghana Ray* v *State*, (1952) 53 Crl L J 1051 (Orissa) A I R 1952 Orissa 200

3 *Inder Singh* v *State*, A I R 1952 Pepsu 61

4 *Morampudi Narasayya* v *Hyderabad State*, A I R 1958 Hyd 79 *Thakur Bhimsingh* v *State*, (1957) 58 Crl L J 100 (Raj) A I R 1957 Raj 5

5 *Gour Gopal* v *Chief Secretary*, (1953) 54 Crl L J 310 (Cal) A I R 1953 Cal 81

6 In re *Pandurang*, (1954) 55 Crl L J 366 (Bom) at p 368

7 *Sunder Singh* v *The State*, (1953) 54 Crl L J 26 (Pun) at p 27 A I R 1952 Punj 406

8 *Devi Singh* v *State of Rajasthan*, (1953) 54 Crl L J 34 (Raj) at p 40-41 A I R 1952 Raj 171

9 *Bal Keshav* v *Commissioner of Police*, (1956) 57 Crl L J 875 at 877 (Bom) A I R 1956 Bom 490 In this case, the order of detention was made by the Commissioner of Police on an important ground which was not a correct ground It was held that the approval of the State made on incorrect facts placed before it was vitiated by extraneous factors and it could not be an approval required by law.

certificate giving approval s not sufficient compliance with section 3 (3) The State Government should have before it all the relevant and material circumstances The approval required is not a mechanical approval, it is an approval which requires a certain mental process and that mental process can only be possible provided not only relevant and proper materials are placed before the Government, but also correct facts are placed before the Government [1] When the Government of the State approves the order made by its subordinate authority, it could not modify the grounds on which the District Magistrate, based his satisfaction, because that would amount to the substitution of its own satisfaction to that of the Magistrate.[2]

The detenue has a right to make representation against the order of detention on the basis of the grounds and particulars supplied to him It is obligatory on the part of the Government to place before the Advisory Board the grounds on which the order has been made, the representation made by the detenue and report of the subordinate officer, if any, within 30 days from the date of the detention order On the failure of the Government to do this in time, the detenu is entitled to be released by the Court forthwith [3]. Similarly, the duty cast on the Advisory Board to submit their report to the Government within 10 weeks from the date of detention must be strictly obeyed.[4] If there is a failure on the part of the Advisory Board, further detention becomes illegal [5-7] The delay in the submission of the report deprives the detenu of the advantage of a fresh decision by the State Government about the continuation of his detention. The failure to make the report within the time prescribed by law may quite conceivably have the effect of unlawfully prolonging the detention and, therefore, after the expiry of the ten weeks he may complain that he has been deprived of his personal liberty otherwise than in accordance with the procedure established by law[5-7]. The Board contemplated under the Constitution and under the Act is a body consisting of three members Therefore, where a detenu's case is considered by only two members of the Advisory Board, it follows that the fundamental right of the detenu as guaranteed by Article 21 has been infringed and that he is entitled to be released immediately [8] At the time of reference by the State Government to the Advisory Board, the Board should have been constituted properly and therefore, if the Chairman of the Advisory Board had not been appointed, then, the Board is not properly constituted, and the reference becomes bad in law [9]

The Advisory Board procedure brings to bear upon the operations of the Act the acumen and concern of trained legal minds, while retaining the informality and speed of an administrative tribunal [10] The Advisory Board is not a quasi-judicial body It is neither a tribunal nor an advisory body In fact, it is an *ad hoc* body which has the powers of revision and recommendation in detention cases. Section 10 of the Act makes a procedural provision for the Advisory Board to call for such information as it may deem necessary from the appropriate Government or from any person called for that purpose through the Government or from the detenu concerned. It is the Board's duty to consider the materials which are required under the law to be placed before it and it is for the Board's discretion to call for such further particulars as it may deem necessary in a given case The detenue has a right to be heard personally Quite obviously, when a representation is made before the Board by the detenu that he should be heard with reference to the records of the cases

1 See foot note 9 at page 38

2 *Ummaomal* v *State of Rajasthan*, (1955) 56 Cri L J 95 (Raj) at p 98 A I R 1955 Raj 6.

3 *Parasuram* v *State*, A I R 1952 Orissa 208

4 (1952) 53 Crl L J 1113 (Orissa) A I R 1952 Orissa 208

5-7 *Umedsing* v *State*, A I R 1953 Sau 51, *Debhi Hrishingh* v *State*, (1953) 54 Crl L J 586 (Sau) A I R 1953 Sau 63, *Choudhury Daram Singh Rathi* v *The State of Punjab*, (1958) S C J. 425 (1958) M L J Crl 409 (1958) S C R 996 A I R 1958 S C 152

8 *Kishorilal Bahati* v *The State*, A I R 1951 Assam 169

9 See *Karamvir Singh* v *State of Bihar*, (1953) 54 Crl L J 1690 (Patna) A I R. 1953 Patna 334

10. *David R. Bayley op. cit. p.* 103.

which he wanted to be called for, the Board must be deemed to have considered that prayer and held that it is not essential or even necessary to call for those records. The detenue could challenge the correctness of the allegation in the proceedings before the Advisory Board [1] The real statutory obligation laid on the Advisory-Board is to report its opinion to the Government. There is no further statutory obligation to report to the Government the reason for that opinion The Court is not entitled to examine the contents of the report for any purpose All that the legislature provided for was that there should be no ambiguity about the opinion of the Advisory Board reported to the Government If the report is against detention, the Government has no option but to release the detenue forthwith On the other-hand, if the report approves of the detention, the Government, may but is not bound to continue the detention If it does decide to continue the detention, it has to fix the period of such detention.[2-3] When the Government decides to continue detention on the basis of the report, such confirmation has to be made within 3 months from the date of detention [4] From the decision of the Supreme Court in *Shibban Lal* v *State of U P.*[5] it follows that when the Advisory Board finds that any of the several grounds upon which the detention order is based is irrelevant, vague or non-existent, the Board must hold that there is no sufficient cause for detention, for if, in such a case the Board recommends for confirmation of the order on the grounds which are valid or existent, the Court would quash the order on a motion for *hebeas corpus* [6] There is nothing in the section to require the Government to communicate the order of confirmation to the detenu [7] Home Secretary's communication to the Superintendent of Jail saying that the representation of the detenu to the Advisory Board has been rejected will not constitute an order of confirmation.[8]

VII. Law of Preventive Detention in the State of Jammu and Kashmir.

Article 22 of the Constitution of India and the Preventive Detention Act, 1950, do not apply to the State of Jammu and Kashmir Only the State Preventive Detention Act applies to that State In the exercise of his power under Article 370, the President has promulgated the Constitution (Application to Jammu and Kashmir) Order 1954, whereunder the State Legislature has been given the power to make a law relating to preventive detention, and a new clause (*c*) is added to Article 35 laying down that the application of Part III be excluded in territories of that State. The result is that so long as the order of the President remains in force, the provisions of Articles 21 and 22 of the Constitution will not apply to a detention order made by the executive of the State in the light of the State Act relating to the preventive detention The Jammu and Kashmir Preventive Act 2011, is therefore a valid piece of legislation, even though it may violate the provisions of Article 22 of the Constitution [9] Thus, if a declaration is made under proviso to section 8 (1), the

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1 The question of the truth of the statements contained in the grounds is not within the jurisdiction of the Court *Bhim Senu* v *The State of Punjab,* (1951) S C J 747 (1951) 2 M L J 641: A I R 1951 S C 481 at p 484 (1958) 59 Crl L J 1047 (Mad) at page 1049 A I R 1958 Mad 425 63 (1962) 1 Cr L J 279 (Cal) A I R 1962 Cal 119

2-3 (1958) S C J 425 (1958) M L J (Crl) 409 (1958) S C R 996 at p 997 A I R 1958 S C 152 Fixing of the period of detention in the initial order itself is contrary to the scheme of the Act, because it would tend to prejudice a fair consideration of the detenu's case by the Advisory Board, though he would have to be released forthwith, if the Advisory Board reports that there is no sufficient cause for detention *Makhan Singh Tarsikka* v *State of Punjab,* (1952) S C R 368 (1951) S C J 835 A I R 1952 S C 27 also (1955) 56 Cr L J 95 (Raj) A I R 1955 Raj 6

4 A I R 1953 Sau 51 A I R 1953 Sau 138 A I R 1952 Pepsu 134 and (1959) 60 Cr L J 63 (Mysore) at p 65 A I R 1959 Mys 7

5 (1954) S C R 418 at p 422 (1954) 1 M L J 143 (1954) S C J 73 A I R 1954 S C 179

6 *Basu, op cit see p* 294 (1960) S C J 611 : (1960) 2 S C R 671 (1960) 1 M L J (S C.) 1: (1960) 1 An W R (S C) 1 (1960) M L J (Cr) 358 A I R 1960 S C 554

7 *Prahlad* v *State of Bombay,* A I R 1952 Bom 1

8 *Sital Prasad* v *State,* (1952) 53 Crl L J 1493 (Punjab) : A I R 1952 Punj 349

9 *Kesar Singh* v *State of Jammu and Kashmir,* (1963) 1 Cr. L J 765 : (Jammu & Kashmir) at p 768 : A I R. 1963 J. & K 23.

Government's duty under section 8 (1) to communicate the grounds of detention to the detenu will not arise and consequently, no right to make any representation contemplated by section 8 (1) can arise.[1] The provisions of Article 35 (*c*) which aim at saving the Preventive Detention Act of the Jammu and Kashmir State is not *ultra vires* the powers of the President [2] The procedure laid down by law has to be strictly observed and where deviation from legal procedure is established the detenu is entitled to be set free.[3] Thus, where the detention orders are not served on the detenus in accordance with the procedure established by section 4 of the State Act, the arrest and detention of the detenus are both improper and invalid.[4] When direction as to the execution of an order of detention are given in the order of detention itself, those directions have to be meticulously followed and hence, where the order of detention has provided that notice of the said order shall be given to the detenu by delivering a copy of the order to him, and no such copy is delivered to him, then the order of detention is bad [5] When the declaration under section 8 (1) is not made by the Government within the time stipulated, the detenu must be held to have been deprived of his liberty otherwise than in accordance with the procedure established by the Act.[6] If the grounds supplied to the detenu are vague, indefinite and not sufficient to enable him to make an effective representation, detention becomes bad in law [7] The extraordinary situation which continues to exist in the State of Jammu and Kashmir has necessitated the passage of such a law of preventive detention, depriving the detenu of the meagre safeguard provided for in the Constitution of India

Conclusion

An appraisal of the law of preventive detention made above will bear witness to the fact that the efforts of the Courts have been to jealously safeguard the personal liberty of the individual, without at the same time allowing the Preventive Detention Act to remain an ineffective instrument in the hands of the State. "Preventive detention is valuable, after all, exactly because it sets aside many elements, in ordinary judicial procedure It becomes clear therefore, that no set of procedures designed to protect the detenu can quite substitute for the guarantees of judicial procedure "[8] This is the place to answer the question whether an individual who legitimately exercises his fundamental rights conferred on him under Part III of the Constitution can be deprived of his personal liberty during times of normalcy The answer to the question is in the affirmative, provided the individual has placed himself in the circumstances, not of his own making Of course, the authority always acts on suspicion and in fact the information it possesses may fall short of legal proof of any specific offence It may be said that a person, thus preventively detained, could controvert the allegations levelled against him and dispel the suspicions of the authorities It may be also said that the individual could secure his release in three months by establishing the falsity and incorrectness of the statements contained in the allegations by exercising his right of representation before the Advisory Board or even in a month's time[9] from the Court by showing that the

1 (1963) 1 Cr L J 765 (J & K) at 768, 76 A.I R. 1963 J. & K. 23.

2. *Mohd Subban* v *State*, (1956) 57 Crl L J 48 (J & K) A I R 1956 J & K 1

3 *Ibid* per Killam and Shahimiri, JJ at p 57 : A I R 1955 J & K 17.

4 *Ibid* at p 57

5 *Hissan-ud-Din Banday* v *The State*, (1955) 56 Crl L J 1071 (J & K) at p 1072 : A I R. 1955 J & K 7

6 *Abdul Jabar Butt* v *State of J & K* (1957) S C R 51 (1957) M L J (Crl) 83 : (1957 S C J 184 A I R 1957 S C 281

7 A I R 1955 J & K 38

8 *David H Bayley, op cit* at p 102

9 Dr Ram Manohar Lohia was able to secure his release in 14 days on a *hebeas corpus* petition, when he showed to the Court how he was re-arrested on that very day of his release on the basis of the grounds which had been held to be illegal on the very same day (1956) 57 Crl L J. 1411 (Manipur) A I R 1956 Manipur 44.

grounds supplied to him are non-existent[1] or are of an inconsequential nature.[1] Is it necessary that in order to dispel the suspicions, he should be in detention ? The *raison d'etre* of this unpalatable procedure is unappealing even to a layman, leave alone for the jurist. "In the balance between private rights and Governmental power, with respect to preventive detention the preponderance is clearly on the side of the Government This is not to say that as a matter of factual record in the past 11 years private rights have been wantonly trampled underfoot. But it is to say that a legal instrument exists for the ready accomplishment of this end.[2] Dr. Ambedkar, the spokesman of the Drafting Committee expressed general anxiety with respect to the growth of undisciplined movements and parties in India by saying in the Constituent Assembly that it seemed uncertain whether people and parties would behave in a *constitutional manner* in the matter of getting hold of power or whether they would resort to unconstitutional methods for carrying out their purposes He also predicted that if all the people followed purely constitutional methods to achieve their objective, the necessity of having preventive detention might not have been there at all. A free nation cannot go along without free people. A people without due process of law cannot become a free people. If, in fact the Act was promulgated to contribute to the establishment of the pre-conditions of democratic tutelage, the remedy lies not in resisting the tendency to become sterile and insensitive to the democractic principles, but in trusting the people to be behave in a constitutional manner, for which it is imperative to scrap this law of preventive detention at the earliest possible time

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1. " The Court must be satisfied that vague or irrelevant grounds are such as, if excluded, might reasonably have affected the subjective satisfaction of the appropriate authority. It is not merely because some grounds or reason of a comparatively unessential nature is defective that such an order based on subjective satisfaction can be held to be invalid ", *Dwarak Doss Bhatia* v *State of Jammu and Kashmir*, (1956) S C R 948 at p. 955 . (1957) M L J (Crl) 58 (1957) S C J 133; A I R 1957 S C 164

2. *David H Bayley*, op cit p 104.

BOOK REVIEWS.

MULLA· PRINCIPLES OF HINDU LAW, 13th Edition, with a general Introduction to Hindu Law and with Commentaries on the Hindu Marriage Act, 1955, the Hindu Succession Act, 1956, the Hindu Minority and Guardianship Act, 1956, and the Hindu Adoptions and Maintenance Act, 1956. Edited by Sri S. T. Desai, Senior Advocate, Supreme Court. Published by N. M. Tripathi Private Ltd., Bombay 1966. Pages 1055 Price Rs. 22.

Two books on Hindu Law have, for decades, been outstanding and stood foremost in the field, the one characterised by historical perspective and scholarly exposition and the other by crisp statement of principles without embellishment. Mayne and Mulla were names to conjure with. The advent of codification of large chunks of Hindu Law in the years 1955 and 1956 have, in a large measure, thrown into the shade these valuable treatises. Till the eleventh edition of Mulla's book the interval between two editions was about 4 years. Since then it has risen to 7 years.

Post-Constitution legislation relating to Hindu Law has cut deep into that time-honoured and ancient law with the oldest pedigree of any known system of jurisprudence and cut hard It was a sequal to the pledges written into the Constitution relating to abolition of discrimination based on birth, race, caste, creed and sex· And it was inevitable. The "undetermined residue" of that law to which Sri Desai refers centres round the joint family institution. Even in regard to it statute law has nibbled at it through indirect rather than frontal attacks leaving it altogether bruised and battered. The provision in the Proviso to section 6 of the Hindu Succession Act for a person's undivided interest in joint family property passing not along the traditional lines of survivorship but in accordance with the provisions of the Act where the deceased had left a female heir of Class I or her male representative and the provision in the *Explanation* to section 30 conferring testamentary power in relation to the undivided interest in Mitakshara joint family property etc., form powerful portents of the destruction of that institution, in the not remote future.

The task of editing a book like Mulla's Hindu Law is not easy. On the one hand to incorporate into the old framework the very considerable and fundamental changes in law made by the statutes retaining its integrity is not possible. To keep the old law and the codified part in different compartments on the other hand cannot be attended by happy results. A third alternative would be to represent the codified part of the law under each section indicating in the comments thereon the nature of the changes effected and the uncodified part as it is indicating the inroads into it made by statute and their repercussions. In editing this work the second mode of approach seems to have been adopted with the addition of a really brilliant and helpful Introduction.

One or two points in relation to the law as stated may be mentioned. On page 696 it is said that remarriage contracted by a divorced spouse within one year of the divorce will be null and void under section 15 of the Hindu Marriage Act. It would have been helpful if the parallel provisions in section 30 of the Special Marriage Act, 1954 and section 57 of the Indian Divorce Act wherein the words "but not sooner" occur had been adverted to and the significance of the non-occurrence of such language in the Hindu Marriage Act explained. On page 921 dealing with the effect of an adoption by a widow under the Hindu Adoptions and Maintenance Act, 1956, it is stated that for all purposes the adoptee becomes the son or daughter not only of the widow but of her deceased husband as well . This conclusion is highly debatable and seems to be opposed to,the policy contained in sections 12 and 13 of the Act. Under section 12 the status arises *vis-a-vis* the adopter from the date of the adoption implying thereby that it cannot fasten with reference to an earlier state of affairs when the widow's husband was alive. In other words there can be

no relation back in any sense Again under section 13 a husband subsequently married does not become the father of the boy If the future cannot affect, neither can the past.

It is true that in many modern English publications typographical mistakes have tended to become a regular feature But in such a high class work as Mulla's Hindu Law to find such errors is rather surprising. Attention may be invited to a few such On page 628 it is printed "overrinding effect", on page 642 "peition", on page 662 "mentral cruelty", on page 762 "allenuated form" and on page 1028 "divorce horny question". On page 528 in the body of the work a footnote (*d*1) is indicated, but none is to be actually found.

On the whole the book is a standard work edited most competently.

THE SUPREME COURT ON INDUSTRIAL LAW, by *J. K. Soonawala.* Published by N. M Tripathi Private Ltd., Bombay. 1966. Pages 1295 : Price Rs 50.

The transformation of an agricultural economy into one based on industrialisation of the country is bound to have repercussions on Organisation of Industries, Managerial Problems, Employer and Employee relations etc., and when this is coupled with the attempt to create a welfare State the problem of social justice is bound to leave its impact on those matters at every turn. Quite a spate of Industrial and Labour laws have been enacted and these have resulted in a large number of decisions not always easy to reconcile. Fortunately out of the decisions of the Supreme Court of India in relation to industrial and labour disputes a new jurisprudence is gradually emerging.

Article 141 of the Constitution provides that the law declared by the Supreme Court shall be binding on all the Courts within the territory of India. Part IV of the Constitution enunciates a set of directive principles of State policy indicative of the ideology behind the Constitution in the matter of achieving a welfare State to which legislation is expected to measure up. These principles serve to influence interpretation of the newly enacted laws by the Court

The book under review is designed to be a comprehensive reference book containing an analysis of the decisions of the Supreme Court on all the Industrial and Labour Laws of the land on all Industrial matters rendered during the period 1950-1964.

The book contains 8 parts, each part being divided into appropriate heads Part I contains 14 chapters and each chapter deals with a different aspect of industrial adjudication. The first chapter gives the text of the provisions of the Industrial Disputes Act, 1947, and in the succeeding chapter all the relevant case-law bearing on matters like the object of the Act, what is an industrial dispute, who is a workman, references to decide industrial disputes, conciliation proceedings and settlements, adjudication, award, and the machinery of enforcement of awards are dealt with succinctly. Part II gives the case law suitably arranged under different heads like wages, dearness allowance, gratuity, provident fund, production bonus, other bonuses, and facilities such as leave, holiday, housing, medical and recreational facilities etc., Part III deals with case law relating to profit bonus under different heads. Part IV contains the law relating to strikes and lock-outs which have become almost a feature of our every-day life. Part V deals with the law relating to terms of service. Part VI sets out the decisions relating to the general labour laws and Part VII the case law relating to appeals and writ petitions. Part VIII deals with the case law covering service under Government.

The subject has been dealt with systematically and the whole gamut of industrial and labour law has been analysed. The book is well got up and would form a good addition to the literature on Industrial and Labour Law.

THE CENTRAL SALES TAX ACT (LXXIV OF 1956), by *Sri R. V. Patel.* Published by N. M. Tripathi Private Ltd., Bombay. Second Edition, 1966. Price Rs. 35.

Sales tax has become a bountiful source of income to Government. From the time it first appeared in India under the guise or disguise of "petrol tax" in Madhy. Pradesh in 1938 its tentacles had spread far and wide by 1948. It has now become so all-embracing that even birds and animals have not escaped the clutches of sales tax Originally intended to be a relatively light levy its incidence has also increased with the passage of years. The implications of the sales tax and the complications resulting from the scramble by the States each to get as much out of it as possible, the successive steps taken to tackle the problems and the passing of the Central Sales Tax Act of 1956 are set out in the Introduction to the Book.

The book under review consists of three parts. The first gives the bare text of the Act and the Commentary. The second part contains the full texts of the Act as it stood in 1957 together with all the amending Acts with the relevant Statements of Objects and Reasons. It also gives the full text of the Sixth Amendment to the Constitution of India and the Report of the Select Committee thereon The full text of the Second Report of the Law Commission of India, the Additional Duties Act, 1957, the Provisional Collection of Taxes Act, 1931 and the Notifications published by the State Governments under the powers vested in them by section 8 (5) of the Act are also set out The Third Part gives the Rules published by the Centre and the States. Since the Finance Act, 1966, has made certain amendments to the structure in the rates of tax, comments on the same are also included.

It falls to be noted that the Central Sales Tax Act though a Central enactments is administered by the States. The power conferred on the States to frame Rules has resulted in diverse approaches and the Rules have not minimised the assessee's troubles. The law on the subject is growing up fast. In such a set up a systematic study of the Act in the light of the leading decisions is a desideratum. The author has given a lucid and vivid presentation which is bound to be useful to assessees, administrators of sales tax and lawyers alike.

LAW RELATING TO CONTROLS IN INDIA by *Sri M. L. Chandak* in 2 volumes. Published by Wadhawa & Co., Indore-2. Volume I, 336 pages. Priced Rs. 16. 1966.

In a welfare state controls have tended to become inevitable and are apt to affect many aspects of the citizens' life. Opinion is critical as to how far controls have worked effectively or beneficially to the people in this country. That they are irksome and have cut into the fundamental rights of the citizens and have led to corruption on a large scale have not been seriously challenged. Since however they seem to be necessary in the present economic conditions and facts of life the need to be conversant with the law relating to controls also arises. The present volume is designed to be a compilation and commentary on the Essential Commodities Act, 1955, Industries (Development and Regulation) Act, 1951, the Defence of India Rules, 1962 and the Control Orders made by the Central and State Governments from time to time. The Control Orders listed numbering about 168 are to be published in the second volume.

The Orders and Notifications published from time to time in respect of the controls are so many and are so often modified that they are apt to prove baffling, and have tended to create uncertainty. A book collecting all the relevant Orders and Notifications and presenting them with method and system with useful commentaries attached is bound to be very helpful.

In the Preface the author states that he has tried to "explain the law with the help of copious *sanguine* decisions". What the italicised word is intended to convey is not clear. Under the caption "By the same author" a list of books is given and each is stated to be "forewarded" by a prominent person. Presumably

it is a misprint for "foreworded" which itself should appropriately be "with a Foreword". There are also a number of typographical mistakes. But such mistake seem to have become a normal feature of many of our modern English publications.

SECULARISM ITS IMPLICATIONS FOR LAW AND LIFE IN INDIA. Edited by *Shri G. S Sarma.* Published by N. M. Tripathi Private Ltd., Bombay 1966. Price Rs. 15

This volume contains the papers presented at a Seminar organised at the Indian Law Institute, New Delhi, under the joint sponsorship of the Institute and the Education Commission, Government of India. Summaries of the discussions at the proceedings are also included.

Secularism is the belief that the State, Morals, and Education should be independent of religion. In effect it is a system of social ethics. In the west no doubt secularism has been marked by a break away from religion. It took on a materialistic anti-religious tinge and developed into a dogma Liberalists in the west have however realised that secularism cannot altogether be divorced from ethics or be equated with mere materialism. The ethics of secularism is social justice and social welfare. It is non-religious possibly but not anti-religious. The purpose of secularism is social justice and harmonious social life. It is intended to promote what is socially good and useful and to weed out what is socially bad and harmful. In that sense pristine Hinduism was certainly secular. *Sarve Janah Sukhino Bhavantu* (may all people prosper), dharma is that which supports the world and social order, these and other norms are altogether independent of religion and indicate an essentially secular approach.

India has claimed to be a secular State. This is understood to mean that the State does not sponsor any particular religion and is concerned with remaining neutral in the matter. All that the State is anxious about is to ensure social justice and equality between man and man eliminating privileges claimed on account of birth, race, religion, caste. The Constitution itself has not used the term "secular". In view of Pakistan being a theocratic State the implications of India being a secular State are sought to be fully understood. The Seminar in question was a step in this direction.

Reading through the papers and the report of the discussions there is a feeling that the discussions have posed more problems than solved and that there is a diversity of approach and not much agreement on any important matter. This is perhaps inevitable in a gathering of intellectuals. The Seminar has however done well in focussing attention on the practical as well as metaphysical aspects of secularisms.

THE DEFINITION OF A HINDU.

By

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The task of defining for purposes of law who is and who is not a Hindu is proverbially difficult [1] The statutes which go to make up our so-called "Hindu Code" take a despairing stand A person may be a Hindu for this purpose though he is not a Hindu by religion, *i e*, even if he fails to fulfil a religious test, such as the one we are going to discuss below—and if he is an infant he may be a Hindu if he is brought up as a member of a tribe, community, group or family to which his Hindu parent belongs or belonged (see Hindu Marriage Act, 1955, S 2) * The real test, for purposes of the codified law, is whether the individual in question is a Muslim, Christian, Parsi or Jew, and if we assume for purposes of discussion that there is no problem about *these* definitions we can determine that the individual is a Hindu by learning that he is not one of the others (see Hindu Marriage Act, 1955, s 2 (1) (*c*).

The uncodified law is sufficiently vast in extent There the old problems about the definition of a Hindu remain An intringuing question is raised in the *Satsang case*, namely *Shastri Yagnapurushdasji* v. *Muldas Bhundardas Vaishya*[2] The judgment, which is that of Gajendragadkar, C. J, delivered shortly before he gave up his seat as Chief Justice, is remarkable in many ways The present writer is not used to praising (a man's deeds are usually sufficient praise for him, and if they fail he himself seldom needs others to help him out), and there is seldom any point in writing an article to praise a judgment which is its own best advertisement; but this case is remarkable even in this, that it deserves to be brought to the attention of people who do not read the law reports for pleasure, who have use for law reports only as tools of a trade, and even those who have given up using law reports for any purpose.

The facts of the *Satsang case*[2] can be abbreviated for our present purpose Under a succession of Bombay statutes Harijans were authorised to enter into Hindu public temples and worship there as other Hindus already were. The members of the Swaminarayan sect claimed that their temples did not come within the scope of the Bombay statutes, as the Satsangis, *i.e*, the initiated members of the Swaminarayan sect, were not Hindus, and their temples were not Hindu temples It would have been possible to decide the issue by merely showing from evidence of the history and doctrines of the Swaminarayan sect (as was actually done) that the sect was a reforming Hindu sect. The founder was a *sanyasi* who believed, no doubt rightly, that the Vaishnava teachers of the Vallabhacharya *sampradaya* had become corrupt, and that worship of the God Vishnu should be taught to his disciples in association with certain undertakings on their part to live in holiness, avoiding lying, theft, adultery, intoxication and animal food. The devotees of the sect wordship the Lord Krishna, their prayer being *Sri Krishnah saranam mama* ('Great Krishna is my regfuge'). The sect believes in the sanctity of the Vedas, and have an organisation for the purpose of initiating disciples and maintaining a continuity of faith and worship The sect is important in the limits of the former Bombay Presidency It was well known in the time of that indefatigable enquirer into Indian religion, Sir M. Monier Williams who personally conducted investigations into its history and beliefs, and the Bombay Gazetteer gives substantial information about them. It was obvious that the Satsangis were Hindus, especially in an age like the present when Sikhs, Jainas,

1 On Hinduism, conversion etc. *see* Derrett, *Introduction to Modern Hindu Law* (Oxford University Press, 1963) § 17.

* See also Hindu Succession Act, 1956, S 2, Hindu Minority and Guardianship Act, 1956 S. 3 and Hindu Adoption and Maintenance Act, 1956, S 2. *Editor.*

2. (1966) 2 S C.J 502 : A.I.R. 1966 S.C. 1119.

Buddhists and Lingayats, are treated for legal purposes (with some exceptions)[1], as 'Hindus' True the Jainas of Bombay had for a time claimed exemption from the Harijan Temple-entry legislation, because the word 'Hindu' could not then be held to include Jaina for this purpose an error which was later rectified. But Satsangis, as the members of our sect are called, were as evidently Hindus as Sikhs and Lingayats, or Arya Samjists or Brahmo Samajists

The case could have been disposed of on this footing, without reference to the definition of Hindu, but the manner in which the case had been argued left it open to go further It was alleged that the Satsangis were not Hindus and their temples were not Hindu temples because the founder himself was worshipped, Swaminarayan being a deity for the sect, and because Muslims and Parsis were admitted to the sect and obtained *diksha* (initiation) within it The Supreme Court judgment does not mention that these were the non-Hindus who became members but the fact is mentioned in the judgment in the Court below (*State of Bombay* v. *Shastri Yagna Purushadasji*[2], The further point that women also received *diksha* is not worth pursuing, and was more or less neglected. It is common ground that the sect embraces many castes, Brahmin and non-Brahmin alike, but this is a common characteristic of Vaishnava sects The presence of Muslims and Parsis within the sect however raises curious and important problems The Supreme Court has now held that the temples are Hindu temples, though they may be used by Muslim and Parsi worshippers.

The special features of the judgment in the Supreme Court are these —

(1) It relies on no judicial authority ,

(2) It relies on a legislative precedent (the Hindu Code) but only in a glancing or indirect manner .

(3) It relies on established authorities who discuss the Hindu religion, but discuss it in a particular modern and enlightened manner ,

(4) It relies also on the text of the *Bhagavadgita*, thus for the first time (?) making this a judicially recognised authority ,

(5) and it relies on a view of the purpose and spirit of the Constitution with reference to religion which is not by any means original, but which deserved to be stated in this connection.

The judgment can serve as the adieu of the learned Chief Justice to his profession , to a career in which a desire for social justice and an interest in the personal law of the Hindus have manifested themselves markedly and for long. Chief Justice Gajendragadkar was born in a family in which sastric learning was traditional, and the development from the old fashioned dyed in the wool Sanskritic culture in which people of his generation and caste were born, through the depressing experience of administering the Anglo-Hindu law with its bogus Hinduism and distorted and antiquated rules, up to the heavy responsible task of administering Indian law to an Indian people in contexts in which they insist upon being seen as Indians and not as the artificial creature which is the Anglo-Indian legal Indian this development is one which the observer who has eyes to see can mark with admiration For this life story and this intellectual pilgrimage is not merely that of the present Vice-Chancellor of Bombay University, but of his generation, whether they are conscious of it or not. The beautiful style and the lofty sentiments of this particular judgment, the calm and peaceful manner in which the distasteful litigation is laid to rest are a *quietus* for a long dying stage in the history of Hindui m itself. Readers will agree that the following passage makes delightful and thought provoking reading :

" It may be conceded, that the genesis of the suit is the genuine apprehension entertained by the appellants but as often happens in these matters, the said apprehension is founded on superstition, ignorance and complete misunderstanding

1. For a purely social purpose "Buddhist" may not be included in "Hindu" : *Narayan Waktu Karwade* v. *Punjabrao Hukam*, (1958) 60 Bom L R. 776 (representation of Scheduled Castes).

2. (1959) 61 Bom. L.R. 700, 707 : I.L.R. (1960) Bom. 467.

of the true teachings of Hindu religion and of the real significance of the tenets and philosophy taught by Swaminarayan himself

'While this litigation was slowly moving from Court to Court, mighty events of a revolutionary character took place on the national scene The Constitution came into force on the 26th January, 1950, and since then, the whole social and religious outlook of the Hindu community has undergone a fundamental change as a result of the message of social equality and justice proclaimed by the Indian Constitution The solemn promise enshrined in Article 17 has been gradually, but irresistibly, enforced by the process of law assisted by enlightened public conscience As a consequence, the controversy raised before us in the present appeal has today become a matter of mere academic interest We feel confident that the view which we are taking on the merits of the dispute between the parties in the present appeal not only accords with the true legal position in the matter, but it will receive the spontaneous approval and response even from the traditionally conservative elements of the Satsang community whom the appellants represent in the present litigation. In conclusion, we would like to emphasise that the right to enter temples which has been vouchsafed to the Harijans by the impugned Act in substance symbolises the right of Harijans to enjoy all social amenities and rights, for let it always be remembered that social justice is the main foundation of the democratic way of life enshrined in the provisions of the Indian Constitution "

The Harijans wanted to enter the temples not because they could not worship Lord Krishna outside them, but because their exclusion was a social distinction which the present age can no longer justify His Lordships words are therefore, apt In so far as there was a social discrimination against them this is removed The result is not that the Harijans can approach nearer to the image than other Hindus His Lordship points out that the Harijans are entitled only to such rights of *darsana* as were possessed by non-Harijans and interference with the routine of the temple and the worship of the image by the *pujaris* is not contemplated.

In order to determine how a sect which worshipped the historical individual Swaminarayan, and which admitted Muslims and Parsis to *diksha* could be a Hindu sect, it was desirable to cover the broad history of Hinduism, and this is elaborately done with ample citations from the works of Dr S Radhakrishnan, from Max Mueller and from B G Tilak The account starts with the significant fact that 'Hindu' is essentially a geographical and political term, indicating a nationality, not a religious denomination The absence of creed and dogma is emphasised. No Hindu can cease to be a Hindu for unorthodoxy, a fact to which we shall return. As a matter of history "the Hindu thinkers reckoned with the striking fact that the men and women dwelling in India belonged to different communities, worshipped different gods, and practised different rites " The process of assimilation and adaptation which the thought and beliefs of the Hindus have undergone are noted. The development of the Hindu religion "has always been inspired by an endless quest of the mind for truth based on the consciousness that truth has many facets " There follows a reference to monist idealism and the different categories of this all based theoretically on the same scriptures The six *darsanas* accept the doctrine of world rhythm Most accept the authority of the Vedas All systems of philosophy accept the doctrine of rebirth and pre-existence Many gods are worshipped. Saints arose from time to time to remove from Hindu thought and practice elements of corruption and superstition As a result of the teachings of Ramakrishna and Vivekananda Hindu religion flowered into its most attractive, progressive and dynamic form. The ultimate goal of humanity is *moksha*, absorption, assimilation with the infinite. How is this to be attained? Some emphasise *jnana*, others *bhakti*, others again *karma* (performance of duties) "It woud be inappropriate to apply the traditional tests in determining the extent of the jurisdiction of Hindu religion It can be safely described as a way of life based on certain basic concepts to which we have already referred " Arnold Toynbee did well to recognise the essential fact that Hinduism as a religion recognises that there is more than one valid approach to truth and salvation.

Worship of Swaminarayan, the founder, is therefore nothing other than a recognition that the Lord reincarnates himself when *adharma* is in the ascendant. For what does the *Gita* say (IV.7) ?

यदा यदा हि धर्मस्य ग्लानिर्भवति, भारत ।
अभ्युत्थानमधर्मस्य तदात्मानं सृजाम्यहम् ॥ ७ ॥

Whenever there is decay of righteousness, O Bharata, and exaltation of unrighteousness, then I create Myself.. ....
(and one must continue)

परित्राणाय साधूनां विनाशाय च दुष्कृताम् ।
धर्मसंस्थापनार्थाय संभवामि युगे युगे ॥ ८ ॥

For protection of the good, and destruction of evildoers, for the sake of firmly establishing righteousness, I am born from age to age

As the author of the *Gita* knew perfectly well, the duties of protecting the good and destroying the evil were the characteristic duties of the king, and so also was the duty of establishing *dharma* Lord Krishna is therefore declaring that his incarnations have the royal stamp and purpose The State is bound we shall add, in Hindu eyes, to perform these functions, and it is inconceivable that the State should fail to recognise the propriety of belief and worship directed to this end Swaminarayan was unquestionably a purifier of *dharma* and an establisher of *dharma* and that is why his sect has flourished Naturally his followers, being Hindus are entitled to erect a temple to house his image and to accord their founder divine honours, and, whatever rival sects may think, the State is bound to accept this so long as Hindu principles must be the test—and in determining whether a temple is a Hindu temple no other principles can be referred to The State is (we may comment) not a secular state in that it ignores or is indifferent to religion but a state like that of ancient India in which the balance between all religions is faithfully kept and righteousness is sought to be enforced consistently with the welfare of all. This is a very special (and Hindu) view of secularism

The admission of Muslims and Parsis was certainly a problem at first sight. It was not contended that the Muslims and Parsis were converted Had that contention been made we should have been back on familar ground. No formal conversion is necessary (*Ramayya* v *Josephine*)[1] If an individual professes the Hindu religion, aiming to be identified with Hindus a presumption that he is governed by Hindu law arises *Mokka* v *Ammakutti*[2] But here the Satsangis of Muslim and Parsi origin remained Muslims* and Parsis and presumably must be governed by their respective personal laws and not by Hindu law. Hinduism admitted them to be members of the sect, but their conversion to Hinduism generally or for purposes of application of Hindu law was not contemplated. This is how the learned Chief Justice puts it (page 1184) :

"It is true that the Swaminarayan sect gives Diksha to the followers of other religions and as a result of such initiation they become Satsangis without losing their character as the followers of their own individual religions. This fact, however, merely shows that the Satsang philosophy preached by Swaminarayan allows followers of other religions to receive the blessings of his teachings without insisting upon their forsaking their own religions. The fact that outsiders are willing to accept Diksha or initiation, is taken as an indication of their sincere desire to absorb and practise the philospophy of Swaminarayan and that alone is held to be enough to confer on them the benefit of Swaminarayana's teachings. The fact that the sect

1. A I R. 1937 Mad 172
2. (1927) 54 M.L J 174 : I L.R 51 Mad. 1 22-3, 39 (F.B)

* While it may be possible to regard a Muslim *Satsangh* from the Hindu viewpoint as a Hindu for purposes of entry into Hindu Public Temples and worship, under the Bombay Statutus, it is doubtful whether he can still be a Muslim for purposes of Muslim law in view of Islam not permitting image worship (in the instant case of Swaminarayan)—*Editor.*

does not insist upon the actual process of proselytising on such occasions, has really no relevance in deciding the question as to whether the sect itself is a Hindu sect or not."

Thus Hinduism believes in various paths leading to one goal. This was true of Indians now called Hindus. The coming of other faiths, including those who adopt an exclusive attitude to salvation, did not alter the position so far as Hinduism was concerned. The special adjusting and assimilating quality of Hinduism, which turns out on reflection to be nothing other than a function of those unique adaptive and assimilative qualities of Indians which no other nation can rival, has now been given voice in appropriate litigation before the Supreme Court. The learned Chief Justice again quotes the *Gita* (IX. 23)[1]

येऽप्यन्यदेवताभक्ता यजन्ते श्रद्धयाऽन्विताः ।
तेऽपि मामेव, कौन्तेय, यजन्त्यविधिपूर्वकम् ॥ १३ ॥

"Even the devotees of other Deities, who worship full of faith, they also worship Me, O son of Kunti, though their method is irregular."

One is reminded of a judgment in Madras by Chandrasekhara Iyer, J., which has always been a favourite with this writer, but which has been somewhat disliked by those, who, apparently, had an inadequate view of what Hinduism in the broad really means. This is *Kolandai* v *Gnanavaram*[2]. Here it was held that a Hindu might validly alienate family property for the purposes of a Church, for a broad tolerance was consistent with traditional Hinduism It is a comfort to see that the Islamic rule whereby gifts and bequests in *wakf* cannot be made by non-Muslims has been abolished in India (*see Syed Edulla* v. *Madras State Wakf Board*)[3] It is now possible for Hindus to dedicate property to a Muslim religious charity, and for this to be valid both at Hindu law and at Islamic law, at least as the latter is administered in India. This of course violates the *karma-kanda* aspect of Hinduism

But have not many such violations occurred ? Temple-entry, prohibition of *devadasis*, prohibition of animal-slaughter for sacrifices, prohibition of *sati*, and many such inroads upon religious practices at once come to mind. One could write a long list, not least prominent in which would be inroads upon Hindu-law made by the 'Hindu Code' The Constitution itself requires that untouchability shall be eliminated, and this was, whatever else it was, unquestionably founded on religious premises.

The answer to all this is given, by the way, in this judgment itself Hinduism regards the various paths to salvation as " not only compatible with each other, but... complementary " This age sees, as is only natural when agricultural religion and ethics are losing their hold, a decline in the *karma-kanda* The paths of *jnana* and pre-eminently of *bhakti* are much more frequented. From ancient, indeed very ancient, times it has been acknowledged that the merit earned by sacrifices, or by good works, by performing and abstaining, by purifications and asceticism, cannot be greater than that earned by devotion, mental concentration, sincerity It is curious that exactly the same contrast in paths, and the same prophetic preference for the ethical, the reflective, and the spiritual is to be seen in the religious development of the Jews—and it remains in the balance which survives in Christianity between salvation by faith alone, and salvation by faith demonstrated notably in works

We can turn to the *Gita* again Faith in Lord Krishna, who, by his own definition, is the goal of all sincere worshippers of deities by whatever name known and worshipped, is sufficient for the attainment of *moksha*, the goal of Hinduism as correctly noted in our judgment pp 1130-1 Hinduism accepts all religions which have

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1 The translation given by the learned Judge (p 1135, col 1) takes a different sense from the text and is somewhat free See P V Kane, Hist. of Dharmasastra, III, p. 881.
2. (1943) 2 M L J. 664 . A I R 1944 Mad 156.
3. (1966) 1 M.L.J 17.

the *bhakti* element as consistent with itself, and the *bhakti* emotion is recognised as Hindu, in whatever breast it may be identified In comparison with this path the paths of *yoga*, *jnana* and *karma*, are neither higher nor lower, but merely alternatives. Legislation in keeping with social movements reflects the public's choice, conscious or unconscious of the *bhakti* alternative, and so far as public life in the twentieth century is concerned it is that alternative which obtains recognition and protection.

In a sense the State has put its weight behind the *Gita* itself. Numerous verses could be quoted to expound the point of view, but a few will suffice.

यत्करोषि यदश्नासि यज्जुहोषि ददासि यत् ।
यत्तपस्यसि, कौन्तेय, तत्कुरुष्व मदर्पणम् ॥ ९, २७ ॥

Whatsoever thou doest, whatsoever thou eatest, whatsoever thou offerest, whatsoever thou givest, whatsoever thou doest of austerity, O Kaunteya !, do thou that as an offering to Me

शुभाशुभफलैरेवं मोक्ष्यसे कर्मबन्धनैः ।
संन्यासयोगयुक्तात्मा विमुक्तो मामुपैष्यसि ॥ २८ ॥

Thus shalt thou be liberated from the bounds of action, yielding good and evil fruits ; thyself harmonised by the yoga of renunciation, thou shalt come unto Me when set free

समोऽहं सर्वभूतेषु, न मे द्वेष्योऽस्ति न प्रियः ।
ये भजन्ति तु मां भक्त्या मयि ते तेषु चाप्यहम् ॥ २९ ॥

The same am I to all beings , there is none hateful to Me nor dear They verily who worship Me with devotion, they are in Me, and I also in them.

अपि चेत्सुदुराचारो, भजते मामनन्यभाक् ।
साधुरेव स मन्तव्यः, सम्यग्व्यवसितो हि सः ॥ ३० ॥

Even if the most sinful worship Me with undivided heart, he too must be accounted righteous, for he hath rightly resolved.

क्षिप्रं भवति धर्मात्मा, शश्वच्छान्ति निगच्छति ।
कौन्तेय, प्रतिजानीहि (नामि) न मे भक्तः प्रणश्यति ॥ ३१ ॥

Speedily he becometh dutiful and goeth to eternal peace, O Kaunteya ! know thou (or 'I promise') that My devotee perisheth never.

मां हि पार्थ व्यपाश्रित्य येऽपि स्युः पापयोनयः ।
स्त्रियो वैश्यास्तथा शूद्राः, तेऽपि यान्ति परां गतिम् ॥ ३२ ॥

They who take refuge with Me, O Partha ! though of the womb of sin, women, *vaisyas*, even *sudras*, they also tread the highest Path

मन्मना भव मद्भक्तो मद्याजी मां नमस्कुरु ।
मामेवैष्यसि युक्त्वैवमात्मानं मत्परायणः ॥ ३४ ॥

On Me fix mind , be devoted to Me, sacrifice to Me , prostrate thyself before Me; harmonised thus in self, thou shalt come unto Me having Me as thy supreme goal Krishna is 'transfigured' and manifests a 'form' which reveals his nature

न वेदयज्ञाध्ययनैर्न दानैर्न
च क्रियाभिर्न तपोभिरुग्रैः ।
एवंरूपः शक्य अहं नृलोके
द्रष्टुं त्वदन्येन, कुरुप्रवीर ॥ ११, ४८ ॥

Nor sacrifice, nor Vedas, alms, nor works,
Nor sharp austerity, nor study deep,
Can win the vision of this awful Form ,
Foremost of Kurus ! thou alone hast seen.

नाहं वेदैर्न तपसा न दानेन न चेज्यया ।
शक्य एवंविधो द्रष्टुं, दृष्टवानसि मां यथा ॥ ५३ ॥

Nor can I be seen as thou hast seen Me by Vedas nor by austerities, nor by alms nor by sacrifices.

भक्त्या त्वनन्यया शक्य अहमेवंविधोऽर्जुन ।
ज्ञातुं द्रष्टुं च तत्त्वेन प्रवेष्टुं च परंतप ॥ ५४ ॥

But by devotion to Me alone I may thus be perceived, Arjuna ! and known and seen in essence, and entered, O Parantapa ?

And again,

ये तु सर्वाणि कर्माणि मयि संन्यस्य मत्पराः ।
अनन्येनैव योगेन मां ध्यायन्त उपासते ॥ १२, ६ ॥

Those verily who, renouncing all actions in Me and intent on Me, worship, meditating on Me, with whole-hearted yoga,

तेषामहं समुद्धर्ता मृत्युसंसारसागरात् ।
भवामि न चिरात् पार्थ मय्यावेशितचेतसाम् ॥ ७ ॥

These I speedily lift up from the ocean of death and existence, O Partha their minds being fixed on Me.

Hereupon it may be argued by a reader, that if an Indian is a Hindu when he accepts these doctrines, how far can this definition be used, for the application of the non-codified law, about which doubts remain ? A man who believes in what Dr S Radhakrishnan and Max Mueller and Monier Williams and B.G. Tilak would recognise as components of Hinduism may well be a Hindu and any temple he and his companions build and use may be a Hindu temple within the meaning of a statute concerning temples. But what of an Indian who does not believe, in rebirth ? Mr. Nirad C Chaudhuri, whose somewhat unpleasant book, *The Continent of Circe*, occasionally contains shrewd observations candidly expressed (and never more cogently than when the author himself exemplifies the qualities against which he rails), contends that no Hindu is ever quite devoid of religious belief In his view even the most westernised Hindu believes in the sanctity of the cow and the great rivers, believes in the authority of the Vedas (as public ceremonies seem to show), in predestination and in the continuity of the national ethos But what of a man who renounces all gods, ignores taboos against meat-eating, and generally behaves as if there were neither religious nor social restraints ? One must remember that a personal law is a chapter of law and is not a creed which one is at liberty to renounce as such One cannot leave the fold of those to whom it applies unless one joins another fold recognised by law in a manner of which the law will approve and upon which it can act Thus to believe that one has renounced Hinduism is almost as inefficacious as to believe that one has left society. The law will take no notice of it. This is not due to the flexibility of Hinduism but to the nature of the legal system of a country which applies personal laws In order to be a Hindu for purposes of application of the personal law it is not necessary to have any particular beliefs provided one is a member of a socially recognised community, which in fact is a historical concept. In *V.T.S. Chandrasekhara Mudaliar* v *Kulandaivelu Mudaliar*[1], it was held that,

1. (1963) 2 S.C.R. 440 : A.I.R. 1963 S.C. 185.

although the subject-matter to which the man is obliged to turn his mind is in large part religious, a valid consent for purposes of adoption can be given by a *sapinda* who has ceased to believe in the Hindu religion, at any rate to the extent of renouncing rituals and dogmas generally considered to be Hindu. One is a Hindu for this purpose though he certainly does not accept the *bhakti* path or indeed any other path.

Moreover, though it is not a lapse from Hinduism to be charitable and sociably inclined towards members of all faiths which share the *bhakti* emotion and worship a divine being, it does not follow that because an individual accepts a Hindu sage as a teacher or saint he is automatically subject to Hindu law. Conversion or re-conversion will also be necessary. The social acceptance will be required as well as the religious fellowship, and upon the former Hinduism does not insist as a matter of course.

The *Satsang case* throws light upon the situation of Hinduism today. It does not embrace those who do not choose to join the community, but it shows every favour to good and bad alike in the spirit of its greatest teacher, treating as fellows for the purposes of worship all those who approach with like intent. The so-called problem of the secular state in India would seem to melt away in the face of this demonstration. When *bhakti-marga* is the predominating path the scene must be set for the attainment of the ends of that path by every citizen, and no elements from the *karma-marga* may be allowed to hinder this, for if it were otherwise the State would not perform its function of protecting the good and putting down the bad.

EXTRANEOUS REMEDIES FOR THE ENFORCEMENT OF RULES UNDER THE HINDU MARRIAGE ACT, 1955.

By

TAHIR MAHMOOD*.

Marriages among Hindus solemnised after 17th May, 1955 are, as is well-known, governed by the provisions of the Hindu Marriage Act, unless these are contracted or registered after solemnisation, under the Special Marriage Act of 1954. Under section 5 of the former Act several conditions have been laid down which must be fulfilled by the two Hindus who want to marry each other All these conditions are imperative rules of law which must not be contravened or violated by the intending parties to a Hindu marriage What shall happen if these rules are disregarded and a marriage solemnized in their disregard ? This question is answered in the provisions of the Hindu Marriage Act itself Various remedies, differing from each other in nature, have been provided under the said Act All such remedies of the Act are **post-marriage** remedies, as these can be availed of only if a marriage in violation of the rules under section 5 has already taken place But are there any **pre-marriage** remedies which can be had recourse to for preventing an intended violation of any of the said rules ? What has the Hindu Marriage Act itself to say about it ? Whether a civil suit will be maintainable or an injunction can be sought for this purpose ? The present study is addressed to these and the like questions.

The Rules.—The rules of Hindu Law, pre-marriage remedies for the intended violation of which are under review, may be briefly set, first, as follows.[1]

Rule I. At the time of marriage neither party should have a spouse living.

Rule II. Neither of them should be an idiot or a lunatic.

Rule III The bride must have completed 15th and the bridegroom the 18th year of age.

Rule IV They should have neither **sapinda** relationship with each other nor should be within prohibited degrees.

Rule V: If the bride has not completed 18th year of her age, the consent of her guardian-in-marriage, if any, must be obtained.[2]

The Post-Marriage Remedies: As has been said above, the Act of 1955 itself has provided certain remedies for the **completed** violation of all these Rules Some of these are civil remedies while others are of a penal nature. Before we discuss the availability of pre-marriage remedies, if any, a brief tabulation of the statutory post-marriage remedies cannot be considered unimportant

(a) If Rule I is violated (i) the second bigamous marriage can be declared null and void by a decree of nullity on a petition filed under section 11, and (ii) the guilty party can be prosecuted for the offence of bigamy under section 494 or 495 of the Indian Penal Code [3]

(b) If Rule II is violated, the marriage can be avoided by the aggrieved party by a decree of annulment on a petition under section 12.

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1 Section 5, Hindu Marriage Act, 1955

2 These conditions will be referred to as ' Rules ' all through this paper.

3. Section 17.

(c) If Rule III is violated, the party to the marriage guilty of such violation can be prosecuted under section 18 of the Act.[4]

(d) If Rule IV or V is violated, (i) the marriage can be declared null and void by a decree of nullity on a petition under section 11, and (ii) the guilty parties can be prosecuted under section 18 of the Act.

(e) If Rule V is violated, the guilty party can be prosecuted for fine under section 18 of the Act

All these remedies are available only to the husband and wife in the **marriage concerned.** No person other than themselves can intervene. And some of them are even independent of the validity and do not affect the existence of the marriage. Moreover, for availing these, the parties have to wait till the actual solemnisation of the marriage is over

Pre-Marriage Remedies.—But the Hindu Marriage Act has not provided any procedure to prevent an intended or threatened violation of any of the Rules laid down under section 5 The only pre-marriage remedy found in the Act relates to the prejudiced performance of the guardian under Rule V But it does not deal with an intended violation of that Rule [5] So, if a husband is going to take another wife, his living first wife has no means to prevent it, made available to her by the Hindu Marriage Act And if a girl between fifteen and eighteen years of age is intending to marry without obtaining or against the consent of her guardian-in-marriage, the latter cannot enforce his right under the said Act Similarly violations of other Rules too cannot be prevented in advance by recourse to any provision of the Hindu Marriage Act Thus, if that Act were the only statute to be had recourse to in this matter, nothing could be done unless the marriage in disregard of law is actually solemnized If a party to such intended marriage wants to prevent its solemnisation, he or she is helpless and has to wait until actually entangled in that unwanted marriage And if a person other than a party to the intended marriage, having a genuine interest in its prevention, wants to do so, he too is and always remains helpless so far as the Hindu Marriage Act is concerned. Under that Act such a person has no ways open either before or after the solemnisation of marriage. For these purposes extraneous remedies will have to be sought for beyond the frontiers of the Hindu Marriage Act.

Special Remedies.—A search should be made, first, for special remedies, if any, available in laws other than the Hindu Marriage Act. For the prevention of an intended violation of Rule III, a specific remedy is found under the provisions of the Child Marriage Restraint Act, 1929 According to that Rule no male who has not completed the 18th year and no female who is below 15 years of age, should marry This Rule and the penal provision relating thereto contained in section 18 of the Act are to be construed in the light of the rules laid down in the Act of 1929 Under section 12 of that Act, a Court may, if satisfied through information laid before it, that a child-marriage has been arranged or is about to be solemnised, issue an injunction to prevent the same. So, the remedy for the prevention of a threatened violation of Rule II will be to lay an information before the Court under section 12 of the Child Marriage Restraint Act, 1929. This can be done by the minor parties to the marriage themselves or by any other interested person They can ask the Court to issue an injunction restraining such marriage. The injunction can be issued against any of the following persons —

(i) Males above eighteen years intending to marry a female below fifteen years of age.

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4 Those who *directed, performed* or *conducted* and those parents, guardians or others, in charge of the parties to such a marriage who *permitted, promoted* or *negligently failed to prevent* it, can be prosecuted under the various sections of the Child Marriage Restraint Act, 1929

5. Section 6 (5)—Under this rule a Court can issue an injunction to prevent an intended marriage to which a guardian has consented to against the interest of the bride.

(ii) Persons **performing, conducting** or **directing** that intended marriage.

(iii) Parents, guardians or other persons having charge of the underage parties concerned

Such injunctions are to be issued after offering an opportunity to show cause against their issue Disobeying these is an offence punishable with imprisonment of either description upto three months or with fine upto one thousand rupees or with both.[6]

For prevention of the intended violation of other Rules no specific remedy seems to be available under any particular law An excursion should, therefore, be made for this purpose in the ordinary civil law of the land.

Maintainability of Civil Suits.—Then the important question arises whether an ordinary civil suit filed for the prevention of their violation can be maintained under section 9 of the Code of Civil Procedure The said section 9 lays down that the civil Courts shall have jurisdiction to try **all suits of a civil nature excepting suits of which their cognizance is expressly or impliedly barred.** 'Civil nature' has nowhere been defined. But apparently suits in which the principal question is as to a **civil** or **legal** right will be suits of a civil nature [7] The general rule of law seems to be that when a legal right and an infringement of that is alleged, the civil Courts should entertain suit unless the entertainment is expressly or impliedly barred So, the maintainability of a civil suit for the prevention of violations of the Rules under section 5 of the Hindu Marriage Act will depend, first, on the question whether the said violations result in the infringement of any **civil or legal rights** of any persons The answer seems to be in the affirmative All those Rules do create civil and legal rights in favour of certain persons Some of these may be described as follows —

(i) Rule I vests a right in one spouse that the party to the marriage should not marry again during the life of the former

(ii) Rule II vests a right in all persons that they should not be married to idiots or lunatics

(iii) Rule III vests a right in the minors that they should not be contracted into marriage before attaining majority, and with it the resulting understanding of things.

(iv) Rule V vests a right in the guardians of marriageable brides under eighteen years of age, that they must be consulted, and so on.

Thus if the Rules are violated, the corresponding civil and legal rights will be necessarily infringed And such an infringement will give rise to a cause of action for which a civil suit should be maintained Thus, wherever any Rule under section 5 is about to be violated, a civil suit for the purpose of preventing the same must be entertained

The other condition to be fulfilled for the maintainability of civil suits is that the cognisance must be neither **expressly** nor **impliedly** barred

There seems to be nothing in any section of the Hindu Marriage Act that can be deemed to have "expressly" barred the maintainability of a civil suit to prevent the violation of a Rule under section 5 There are no express provisions in this regard, no doubt But there is no express prohibition too. The question therefore, remains only of an "implied" bar, if any The relevant provisions of the Act in this respect are contained in sections 4, 9 and 19

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6 Section 12, Child Marriage Restraint Act, 1929.

7 Mulla, *Code of Civil Procedure*, 33.

Section 19, saying that all petitions **under the Act** shall be presented to the District Court, clearly refers to the petitions for which provisions have been made in the Act itself Remedies by way of petition provided in the Act are

(i) A decree of restitution of conjugal rights under section 9,

(ii) A decree of judicial separation under section 10,

(iii) A decree of nullity under section 11, when the marriage is void,

(iv) A decree of annulment under section 12, when the marriage is voidable at the option of the aggrieved party,

(v) A decree of divorce under section 13,

(vi) Applications for expenses of proceedings, maintenance **pendente lite** or permanent alimony, under section 24 or 25,

(vii) Application regarding custody of children, under section 26.

The above list shows that no provision for a 'petition' for prevention of an intended marriage in disregard of law, has been made anywhere in the Act Section 19, which has expressly been made applicable to 'petitions under the Act' cannot, therefore, bar the entertainment of a civil suit for a purpose other than those included in the above list

Section 9, dealing with the restitution of conjugal right, has ousted the jurisdiction of the ordinary civil Courts to entertain a suit for that purpose, wherefor only a petition can be presented to the District Court now So, the Madhya Pradesh High Court in 1959[8], and the Punjab High Court recently in 1963[9], held that a civil suit for restitution of conjugal rights, filed by a Hindu, cannot be maintained now A new remedy has been provided specifically and so the maintainability of a civil suit is barred So will be barred a suit for judicial separation, divorce or any other matter listed above But where lies in it an implied bar regarding the maintainability of a civil suit for prevention of a threatened violation of a Rule under section 5 ?

Section 4 (b) lays down that any other law in force immediately before the commencement of this Act shall cease to have effect **in so far as it is inconsistent with any of the provisions contained in it.** But can this section be construed to the effect that section 9 of the Civil Procedure Code cannot have any application to any matter relating to Hindu marriages ? It is very clear that only those laws have been superseded as are inconsistent with the provisions of the Act An attempt to prevent an intended or threatened violation of a Rule under section 5 of the Act cannot be considered inconsistent with any provision of the Act It will be only logically sound and legally valid to encourage and entertain such an attempt

Thus, a civil suit should be perfectly maintainable for the prevention of a marriage which is about to be solemnised in disregard of a Rule under section 5 of the Hindu Marriage Act, unless of course, a special remedy is available under any other special law

The Issue of Injunctions.—Another important question is whether a perpetual injunction can issue under section 54 of the Specific Relief Act, for the prevention of a Hindu marriage in disregard of a Rule ? The said section 54 says that an injunction may be granted to the plaintiff to prevent the **breach of an obligation existing in his favour whether expressly or impliedly.** 'Obligation' stands for every duty enforceable by law ! Is it not a civil and legal duty of every Hindu who wants to marry to fulfil the demands of section 5 ? When a legal duty is imposed on one person in respect to another, that other is invested with the corresponding legal right So, that duty of Hindus impliedly creates various important rights in

8 *Bootan Bai* v *Durga Prasad*, A I R 1959 M P 410

9 *Bhqrwan Bai* v *Lila Ram*, A I.R 1963 Pun. 118.

favour of different persons, **e.g.**, a wife, a minor, a guardian-in-marriage, etc. 'Obligation' was defined in **Hyderabad Stock Exchange Ltd.** v **M|s. Ranganath Rath Co.**[10], as "a tie or bond which constrains a person to do or suffer something It implies a right in another person and restricts the obligee with respect to definite acts" Obligation in this sense does exist in favour of the first spouse under Rule I, of the person to be married under Rule II, of the minors under Rule III, of the guardian-in-marriage under Rule V, and so on And disregard of any of these Rules will necessarily result in a breach of the corresponding obligation There should be no objection, therefore, to the issue of an injunction under section 54 of the Specific Relief Act, for the prevention of a marriage in disregard of any Rule under section 5 of the Hindu Marriage Act, 1955

Civil Suits and Injunctions for Prevention of Bigamy.—In some cases, various Courts have expressly upheld the maintainability of a civil suit and also the validity of an injunction for the prevention of bigamy (Rule I) So, when a Hindu wife intended to remarry during the life of her husband, a civil suit filed by him was held maintainable and an injunction issued to prevent her from doing so, in **Venkatacharyulu** v **Rangacharyulu.**[11]

In **Sitabai** v **Ramchandra**[12], a Full Bench of the Bombay High Court held that where a Hindu husband contracted a second bigamous marriage, the cognisance of a civil suit brought by his first wife for getting the second marriage declared void, was not barred by the provisions of the Hindu Marriage Act

An important decision to be considered on the subject was of the Madras High Court in **Lakshmi Ammal** v **Ramaswami Naicker**[13] It was an appeal from the District Court of Madurai Appellant, the first wife of the respondent, had filed a petition under section 11 of the Hindu Marriage Act seeking a decree of nullity in regard to her husband's second bigamous marriage The District Court had rejected the petition on the ground that section 11 could be availed of only by the 'parties to the second marriage' and not by the first wife In the appeal, the Counsel for the appellant argued **inter alia** that the Hindu Marriage Act was passed for the benefit of women and saved them from their husbands from indulging in polygamy And as the first wife thus got valuable rights under the Act, she should be given the right to apply under section 11, as she will otherwise be left, **remediless.**

The Madras High Court rejected the above argument. It was held that the first wife was not at all remediless She could file a suit under the ordinary law for a declaration that the second marriage of her husband was illegal and void under the Hindu Marriage Act It was held that "the mere fact that she (first wife) will not be entitled to apply under section 11 does not show that she is left remediless. She must only pursue the costlier remedy of filing a suit under the ordinary law There is nothing extraordinary or illegal in it "

The Counsel for the respondent had argued that in cases of bigamous marriage by a Hindu husband, the only remedy that the first wife had, was to file a petition for divorce under section 13 (2) of the Act It is respectfully submitted that the Court, while answering this argument, did not point out important things Petitions for divorce under that section can be filed only if both the first as well as the second bigamous marriage were contracted before 17th May, 1955 In cases of bigamy committed after that date, the said provision cannot be availed The High Court, however, finally held that the first wife would certainly have the ordinary right to file a civil suit to have the second marriage declared void and illegal

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10 (1957) 2 An W R 10 A I R 1958 A P 43
11 I L R (1891) 14 Mad 316 1 M L J 85
12. A I R 1950 Bom 116
13. I.L R (1959) Mad 634 . (1959) 1 M L.J 333 A I.R. 1960 Mad 6.

In both the Bombay and Madras cases reviewed above, the maintainability of a civil suit for prevention of bigamy among Hindus was upheld. But in both the cases the civil suit in discord was filed **after the solemnisation** of the second bigamous marriage. Validity of a civil suit for that purpose, along with other post-marriage remedies under the Act itself, was accepted. But, it is submitted, such a civil suit should be entertained even if filed **before the actual solemnisation** of the second illegal marriage, when the other spouse has intended to marry again. A recent important decision, supporting this submission, is of the Mysore High Court in **Shankarappa v. Basamma.**[14]

It was a Civil Revision Petition from the Court of the Munsif of Gulberga. The plaintiff, a Hindu wife, had filed a civil suit asking for a perpetual injunction restraining her husband from marrying again. The defendant had argued that a civil suit and an application for injunction was not maintainable, as these were barred by the provisions of the Hindu Marriage Act. It was also pleaded that she should have waited till the actual solemnisation of the second intended marriage, after which she could have sought a remedy under the Act. It is respectfully submitted that the Mysore High Court too did not point out an important point. No remedy except a criminal prosecution of the husband, which does not affect the existense of the marriage, is made available to her by the Hindu Marriage Act.[15] It was, however, held that a civil suit by the first wife clearly fell within section 9 of the Code of Civil Procedure and that neither any provision in the Hindu Marriage Act, nor any other law, barred expressly or impliedly such a suit.

As regards the maintainability of an application for injunction under section 54 of the Specific Relief Act, the Mysore High Court held that it could certainly issue. It was laid down that the purpose of section 5 (i) was to create an **obligation** between the two spouses each of whom was prohibited from marrying again in the other's life-time. Thus, one could seek the prevention of the **breach** of the said **obligation,** and is entitled to a perpetual injunction under section 54 of the Specific Relief Act.

Injunctions Restraining Violation of Other Rules.—Like the prevention of bigamy, violation of a guardian's right to be consulted for the marriage of a girl between fifteen and eighteen years of age has also been specifically accepted as a purpose for which an injunction could issue. So, the Bombay High Court had issued an injunction in **Nanabhai Ganpatrava v. Janardhan**[16], to restore the right of a father to give his daughter in marriage, in preference to other relations. Similarly if the right conferred on a guardian-in-marriage under Rule V is denied or transgressed, an application for injunction against those who are violating it, should be maintained by the Courts.

No judicial decisions dealing with the intended violation of other Rules are found. But the discussion in this study leads to the conclusion that an intended or threatened violation of any of the five Rules under section 5 of the Hindu Marriage Act, should be deemed to be a cause of action falling within the purview of section 9 of the Civil Procedure Code as well as section 54 of the Specific Relief Act. And a civil suit or an application for injunction filed to prevent any such violation should be held maintainable beyond all doubts, for all these Rules create legal and civil rights, and wherever there are rights, there must be remedies to work them out.

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14. A.I.R. 1964 Mysore 247.

15. She can file a petition for divorce under section 13 (2) if both marriages were solemnised before the commencement of the Hindu marriage Act.

16. (1888) I.L.R. 12 Bom. 110.

A CRITICAL NOTE ON MOHAMMED HABIBULLAH & ANOTHER v K. SEETHAMMAL, REPORTED IN (1966) II M.L.J. 378.

By

N. BALASUBRAHMANIA IYER, M A , M L., ADVOCATE, COIMBATORE.

It is very difficult to understand the above quoted decision wherein a Division Bench of the Madras High Court has held that the provisions in sections 110 to 110-F of the Motor Vehicles Act, 1939 (IV of 1939) form a self contained code and have no connection with the (Indian) Fatal Accidents Act, 1855 (XIII of 1855).

An examination of the said provisions of the Motor Vehicles Act shows that they provide a machinery for quick adjudication of claims for compensation in respect of motor accidents and the procedure to be adopted by the Tribunals constituted The jurisdiction of the civil Courts to entertain such a claim had been taken away Nowhere do we find in the said provisions, the basis of the liability, the persons entitled to compensation, the defences open to the persons sought to be made liable, the basis for the measure of compensation to be awarded, etc All these pertain to the substantive law of Torts and cannot appropriately find a place in a procedural enactment If the said provisions are construed as a self-contained code, what is the law to be applied by the Tribunal in the adjudication of claims ? The Punjab High Court has rightly (if I may say so, with respect) held in the case of **Sri Ram Piatap v. Punjab Roadways, Ambala**[1] that the Tribunal has necessarily to turn to the law of Torts for fixing the liability If the law of Torts is to be applied, (The Indian) Fatal Accidents Act, 1855 which is a part of the substantive law of Torts is necessarily attiacted

At common law, there was no right to claim compensation in respect of fatal accidents, as the maxim "**actio personalis moitur cum-persona**" strictly applied To remedy this defect, and to provide for compensation for the benefit of the dependants of the victim, Lord Campbell's Act was enacted in England and this was followed in India by the passing of the Indian Fatal Accidents Act, 1855 (XIII of 1855) on the same lines as Lord Campbell's Act The Act for the first time gave a right of action for compensation in favour of the wife, husband, parent or child of the deceased, as they are presumably dependant on the deceased The Courts would consider the degree of dependance on the deceased in assessing the quantum of compensation Apart from the said Act there is no other person who would be entitled to compensation in respect of a fatal accident, and the Act is the foundation foi the claim for compensation in case of death

When the Legislature introduced the relevant piovisions in the Motor Vehicles Act, the use of the word "compensation" imported the whole doctrine of the law of Torts and the claim in case of death can only refer to the claim under the Fatal Accidents Act. The Legislature knew of the provisions of the Fatal Accidents Act and any claim before the Tribunal in case of death can arise only on the basis of that Act.

The learned Judges constituting the Bench which decided the case under notice, held that because the provisions in the Motor Vehicles Act 'make no mention of any kind concerning any of the provisions of the Fatal Accidents Act and do not incorporate any such provision even by the most oblique reference' the application of the Fatal Accidents Act is excluded With great respect it is submitted, no reference to the Act is either necessary or possible Where under law (including the Fatal Accidents Act) a person is entitled to compensation, an application can be made to the Tribunal, which has necessarily to apply the law and grant or refuse compensation prayed for.

1. A.I.R. 1960 Punj. 540.

The learned Judges have decided that any legal representative of the victim of the accident is entitled to compensation, even though under ordinary law, there is no right to recover such compensation If the decision is allowed to stand, even a remote heir who had nothing to do with the deceased during his lifetime, can claim compensation before the Tribunal The Legislature never contemplated any change in the law of Torts while introducing the sections 110 to 110-F in the Act.

BATHON BAI v. A. S. VAIDYANATHAN, (1966) II M.L.J. 412)— A CRITICAL NOTE.

By

V. NARAYANASWAMI, B A., B L., ADVOCATE, HIGH COURT, MADRAS.

It is laid down in the above decision that the fact that the landlord is living in a rented house would be enough to satisfy the Court about the **bona fides** of the requirement under section 10 (3) (a) (i) of the Madras Buildings (Lease and Rent Control) Act, 1960, that the requirement of the landlord must be adjudged as at the date of hearing and that the lack of **bona fides** ought not to be inferred from factors such as the landlord's having other houses or that he or she is not permanently living in the City or Town concerned.

This decision which enlarges the rights of a landlord requiring his building for his own occupation is likely to lead to certain results enabling unscrupulous landlords to victimise their tenants While section 10 (3) (a) (i) of the Act recognises the right of a landlord to claim a building in the occupation of a tenant, it makes the same subject to the claim being **bona fide** which incidentally is in keeping with the main object of the statute, namely, prevention of unreasonable eviction of tenants by landlords The **bona fides** of a landlord has to be tested with reference to the facts of each case and to define the same on set notions and principles divorced from other attendant circumstances of each particular case is likely to result in practical difficulties in the administration of justice. Rulings of the High Court on such matters would tie the hands of the lower Courts in assessing the **bona fides** of the requirements of a landlord by taking into consideration all the facts and circumstances of each case It is not infrequent that a disgruntled landlord attempts to evict the tenant by alleging a **bona fide** requirement to achieve his ends In such proceedings the tenant has to expose the lack of **bona fides** only with reference to the previous course of conduct of the landlord from which alone his motive in seeking eviction can be inferred If a landlord owning a number of buildings in the City, himself being in occupation of one of them chooses to remove himself to a rented building just to be able to evict his unwanted tenant, the tenant will be powerless to resist the eviction proceedings effectively as he cannot plead facts leading to the landlord moving into a rented building, and no reference could be made to his ownership of other buildings in the City and his previous course of conduct in not occupying in the recent past buildings which became available for his occupation

A landlord's permanent residence outside the city or town concerned will throw some light in testing his **bona fides** while calling in aid the provisions of section 10 (3) (a) (i) of the Act and to shut out the consideration of this aspect by the Courts while assessing **bona fides** of the landlord's requirement will enable a landlord to have an easy walk over. Section 10 (3) (a) (i) of the Act which enables a landlord to apply for eviction of a tenant provides for the essential conditions to maintain such a petition and the landlord to be successful therein should satisfy the Court about his **bona fides** failing which the petition should be dismissed as per the provisions of section 10 (3) (e) of the Act. If living in a rented premises by the landlord by itself be deemed to establish his **bona fides**, the provisions of section 10 (3) (e) of the Act are rendered unnecessary and ineffective. It may therefore appear that the above decision requires to be reconsidered on an appropriate occasion.

EXECUTION OF AWARDS, DECREES, ORDERS AND DECISIONS IN THE CO-OPERATIVE SOCIETIES LAW.

By

S R Bhansali

The policy of the Co-operative Societies Acts of all States in India, is to save the members from protracted, expensive and sometimes ruinous litigation of the civil Courts One of the ordinary presumptions always is that the legislation does not intend to make any substantial alteration in the ordinary rules of law beyond what it explicitly declares either in express terms or by implication In all general matters outside those limits the law remains undisturbed. It is in the last degree improbable that the legislature would overthrow the fundamental principles, infringe rights, or depart from the general system of law, without expressing its intention with irresistible clearness. The Co-operative Law has deprived the subject of his common law right of action and provides a special and prompt procedure for cases concerning arbitration, liquidation, etc , in which, having regard to the class of people affected, a speedy decision as to their disputes is essential After obtaining such decision, award, etc , speedily, the judgment-creditor has to pass through another ordeal, **e.g.**, execution proceedings where the judgment-debtor or the defaulter failed to carry out the decision, award, etc Execution is thus the second stage in all litigations, the first being upto the award, decree, order or decision Execution is the enforcement of the orders with the aid of the Court so that the judgment creditor can reap the benefit of the decree, award order, etc The mode of execution naturally depends upon the nature of the decree and the assistance sought at the hands of the executing Court.[1] Such awards, etc., may be classified in the following categories:

(i) An order of recovery made by the Registrar in the course of audit, inquiry, inspection or the winding up of a co-operative society against a person who has taken part in the organisation or management of such society or who is or has at any time been an officer or an employee of the society, for repayment or restoration of money or property with interest or payment of contribution and costs or compensation,

(ii) An order directing the payment of any debt or outstanding demand due to the society by any member or past member or deceased member, by sale of property or any interest therein, which is subject to a charge, made by the Registrar or any person authorised by him;

(iii) Any decision or award passed by the Registrar, or any person who has been invested by the Government with power in this behalf or an arbitrator,

(iv) An order passed by the Liquidator in the liquidation proceedings,

(v) An order passed in appeal, revision or review by the State Co-operative Tribunal,

(vi) Any interlocutory order pending the decision of the appeal or revision passed by the State Co-operative Tribunal, or

(vii) An order passed in appeal by the Registrar, or the State Government

Such awards, decrees, orders or decisions are binding on the parties to the pro

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1 'Execution of the awards and orders in Co-op law', by Anant v. Albal, A.I R. (1965) Journal p 101.

ceedings and they should carry out the order. On the failure of the judgment-debtor or the defaulter the execution proceedings have to be ordered A party should first of all obtain a certificate from the Registrar that the order, decision or award is not yet satisfied and with the aid of that certificate[2], put the award, order, etc in execution, through any of the following ways

(i) In a competent civil Court treating the same as a decree of a civil Court; or

(ii) In the Court of the Collector for recovery treating the decretal arrears as arrears of land revenue, or

(iii) In the Registrar's Court, requiring him to execute by the attachment and sale or sale without attachment of any property of the person or a co-operative society against whom the order, decision, or award has been obtained.

These are three alternative remedies to a person to pursue in one or more forms A question may arise whether a person could follow only one or all the remedies In **Muppanna** v **Shree Gajanan Co-operative Bank,**[3] the respondent Bank obtained an award against one 'S' and others. After obtaining the certificate from the Registrar, to execute the award, the Bank filed four applications one after another in the civil Court, all of which were unsuccessful In the last application the executing civil Court held that the application was barred by limitation. The Bank filed an appeal which was dismissed. Thereafter the Bank obtained another certificate from the Registrar and applied to the Collector for recovery of the dues as arrears of land revenue. The plaintiffs judgment-debtors thereafter field a civil suit for an injunction against the respondent bank restraining it from executing the award through Revenue Authorities. Gajendragadkar, J , held that merely because civil Court held that a remedy of a party was barred, it does not necessarily follow that the claim **ipso facto** lapses. He further observed that an enforcement of the award in civil Court may be barred by limitation. It does not follow that the award becomes infructuous and it was open to the party under the alternative remedy given to it, to apply to the Collector to recover the amount as arrears of land revenue, and it does not appear that that remedy would not be available to a party concerned.[4] A further contention was that if one of the two alternative remedies has been resorted to, the second remedy cannot be availed of by the party Repelling that contention the Court observed

"Section 51, Civil Procedure Code, enumerates the various ways in which a decree of the civil Court can be executed and it is well recognised that it is open to a decree-holder to pursue all or any of his remedies at the same time or even the same remedy at different places It could not be contended with reference to section 51, that a resort to one remedy by implication precludes the decree-holder from resorting to other remedies."

In the case of an application before the Collector the State Acts have laid down twelve years as a period of limitation, from the date fixed in the order, decision or award and if no such date if fixed, from the date of the order, decision or award, as the case may be It would thus follow that if the civil Court has refused to execute or dismissed an application for execution, it is open to the judgment-creditor to apply to the revenue Court for the recovery as arrears of land revenue, provided that the revenue Court is approached within the twelve years' period as stated above

2. An order granting the certificate is not subject to an appeal and is final In *Bhimsen* v. *Urban Bank*, A I.R 1947 Bom 370 the Court observed that the certificate which the Registrar has to grant is not subject to any limitation.

The certificate itself shall not become a decree of a civil Court, but must be deemed as such It is only for the purpose of the civil Court to execute the award *etc* that it has got to be given the force of a decree *See Muppanna* v *Shree Gajanan Co-op Bank*, A I R 1947 Bom 375

3. A I R. 1947 Bom 375.

4. See also *Shimoga Co-op. Bank* v. *Veena Putta Jois*, (1943) 21 Mys L.J 38.

I. **Execution by civil Court.**—The judgment-creditor, if he prefers to follow the course prescribed by the Code of Civil Procedure, has to step into the arena of the Court and follow a rigid and complicated procedure The provisions of O. 21 of the Civil Procedure Code deal with the subject and a reference may be made to the said Order for a relevant question The primary requirement is the petition to be filed under rule 11 of the said Order A question may arise whether such petition should be accompanied with a certified copy of the Award, order or decision In **Pahar U. Co-operative Bank v. Adu Bhuia**[5-6], it was held that along with the application for execution of the award, the award or its copy need not be filed in the Court The only necessity is that the certificate issued by the Registrar must be enclosed with the application for execution In this case the Court observed.

"In joining the society its members agree to abide by its rules, thus they contract that their disputes shall be decided as directed by the Act, and under these provisions of the Act the Arbitrators' awards are enforced by the civil Court Such awards are quite different from ordinary arbitration awards and there is no reason to suppose that it was intended that Schedule II, Civil Procedure Code should apply to them .. . . An award given by the Inspector of Co-operative Societies appointed as Arbitrator by the Registrar is not an award by arbitrators appointed by the parties It has the force of decree and before it can be enforced as a decree it is not necessary to file it in Court as in case of awards by arbitrators appointed by the contract of parties."

If there are more decree-holders than one and the application for execution has been made by some only, security has to be furnished for safeguarding the interest of the rest. An award may be executed on the application of an assignee.[7] A notice to the judgment-debtor under rule 22, is a mandatory provision, if the execution is taken out more than two years after the decree without which the decree cannot be executed When a decision or award or order passed by the Registrar is transmitted to a civil Court for execution, the executing civil Court assumes the position of the Court which passed a decree or award by virtue of Order 21, rule 16, Civil Procedure Code In such a case the Registrar, has, however, power to recognise the assignment only when he is himself enforcing the award or decree because the power of recognising assignment is only incidental to his power of executing the decree [8]

Award, decision or order cannot be challenged in the civil Court.—In pursuance to the notice or on the appearance of the judgment-debtor **suo motu,** if an objection is put forth regarding execution, the same shall be heard by the civil Court and a judicial order has to be passed The Court may overrule the objection, and direct the execution and pass a suitable order. If the order is one relating to discharge or satisfaction of a decree, it falls within the provisions of section 47 of Civil Procedure Code as an appealable order, as otherwise, every order determining the rights of the parties becomes and operates as **res judicata,** at a subsequent stage of the proceedings.[9]

Where an award made under the Co-operative Societies Act is alleged to have been made without jurisdiction and not according to the terms of the Act, it is open to the aggrieved party to bring a suit to that effect, but such objection cannot

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5-6 A I R 1933 Cal 695 (2) See also *City Co-op Bank Ltd, Mysore* v *K P. Swamy,* (1939) 44 Mys. H C R 528 (1939) 17 Mys L J 342

7 *Munisami Chetti* v *Chenchu Naidu,* (1940) M W N 721 (1940) 2 M L J. 216 A I R. 1940 Mad 849

8. *Padmanabha Bhatta* v *Pakiru Rai,* (1960) Ker.L.T 918 (1960) 2 Ker.L.R. 444 : (1960) Ker. L J. 987

9. *See* supra note at 1.

be taken in the execution proceedings started in pursuance of the award, the objectors remedy being an appeal to the appellate authority [10]

A contributory order passed by a liquidator being enforceable as a decree, an objection that the order was invalid because of the omission to give notice to a member before determining his liability cannot be entertained in proceedings for execution of the order.[11]

When a liquidator acts without statutory sanction his acts can be challenged in the civil Court Therefore, if a contributory order passed by the liquidator against a member of the society is without jurisdiction it can be challenged by means of a suit in a civil Court [12] But it cannot be questioned in the execution proceedings, unless the order was without jurisdiction is apparent on the face of the order or capable of being gathered without the necessity of an enquiry into facts In **Prabhakar** v **Balmakridhed Co-operative Society, Ltd.**,[13] the liquidator of the society passed contributory orders against the appellants. In execution proceedings they objected that they were not members of the society and had paid the outstanding debts to the society Puranik, J , rejected this contention and observed

"The forum for raising such objection is not the executing Court unless there are exceptional circumstances patent on the face of the decree or closely allied to it, circumstances which do not necessitate an enquiry into facts. In the case before us there is nothing whatever from which it might be assumed that the action of the liquidator was without jurisdiction."

In **Laxman** v **Dhamori Co-operative Credit Society**,[14] the Deputy Registrar passed an award against a member and his two minor sons on the basis of a mortgage deed executed by them in favour of the defendant society In the execution proceedings the minor sons resisted the award on the ground that the Deputy Registrar had no jurisdiction to pass an award against them who were minors and not members of the society and that under Order 34, rule 14, the mortgaged property cannot be sold without filing a regular suit. The Court rejected this contention and held that the mere fact that the appellants were minors would not be a circumstance which would deprive the Registrar of his jurisdiction to pass an award Further to insist on the necessity for a civil suit on the strength of Order 34, rule 14 is tantamount to saying that the Co-operative Societies Act should be regarded as nugatory It must be noticed that Order 34, rule 14 contemplates decrees for the payment of money only, and as the decision given by the Registrar directs the sale of hte property comprised in the mortgage it does not militate against Order 34, rule 14 While an executing Court is entitled to refuse to execute a decree in particular cases if the Court which passed the decree had no jurisdiction to pass it, nevertheless the fact that the Court had no such jurisdiction must be apparent on the face of the decree or must be capable of being gathered without the necessity of an enquiry into facts.

A civil Court cannot entertain a suit for a declaration that an order of the liquidator is **ultra vires** and cannot be executed.[15] But the Bombay and Calcutta High Courts[16] had, however, taken a different view that, if the order is clearly **ultra vires** the powers conferred on the liquidator or the arbitrator, then obviously the civil Court can intervene and the order or the award may not be executed. In

10 *Balwant Singh* v *Anjuman Amadad Bahami Qarza*, A I R 1939 Lah 40

11 *Rajdarkhan* v *Rambhau*, A I R 1955 Nag 262 , A I R 1946 Nag 161 and *Gumaji Thoraji Marwadi* v *Vishvanath Parbhu Hingmire*, A I R 1922 Bom 195, Ref

12 *Parvathamma* v *Pura Co-op Society*, (1945) 50 Mys H C R 8 (1945) 23 Mys.L J 81

13 A I R 1946 Nag 161

14 A I R 1933 Nag 211

15 (1918) 44 I C 353

16 *Ganpat Rama Rao* v *Krishnaji Das*, I L R. (1920) 44 Bom. 482 , *Somkant Mahant* v. *Sarveshwa Das*, A I R 1927 Cal 578.

other words the executing Court can inquire into the competence of the award or the order.

Mortgage in favour of society—Award made by the Registrar is not a mortgage decree.—The State Co-operative Societies Act provides that the order, decision or award on a certificate signed by the Registrar shall be deemed to be a decree of a civil Court. In other words the order, decision or award itself shall not be a decree of the civil Court, but if that is put in execution, it shall be executed by the civil Court as a decree. If a member has mortgaged his property in favour of the society, any award made in relation to that mortgaged property shall not **ipso facto** become a mortgage decree [17]

When the award, decision or order is against the society, execution cannot be levied against the member.—Co-operative society, being a statutory corporation, is a legal person and its debts are distinct from the liability of its members which members can only be reached by creditors of the Corporation in winding up proceedings [18] Hence it is legally not possible for the Registrar to make an award against the members personally for a debt of the society Member's liability to make good the debts of a society does not arise till the liquidation and no award in favour of a creditor for a debt of the society can either be made or enforced against the member personally. Where an award executable as a decree is being enforced against the society and the member, and the member raised no objection, his son can challenge it at the execution stage of the proceedings but only to the extent necessary to protect his interests He cannot be allowed to fight his father's battles though he may use the same weapons which his father used or might have used The test is "whether the decree was obtained against the father personally or in a representative capacity'.[19]

In **Co-operative Central Bank** v **Narayan Ramjee**[20], when a co-operative society, became heavily indebted to the appellant Bank, the Bank obtained an award from the Registrar against the society. In execution proceedings the fields of a member were sold and were purchased by the Bank The respondents were executing their two decrees against the member of the society They applied for rateable distribution which was allowed The Bank in the present suit claimed that the respondents had wrongly withdrawn an amount in excess of what they were entitled to get and that they were liable to refund the excess amount received by them The defence by the respondents was that the Bank had obtained the award against the society which was a body corporate, and it could not be executed individually against the members thereof The sale of that member's property was illegal and **ultra vires.** The Court rejected this contention and held that the validity of the award could be challenged by the member alone and no one else. Niyogi, J , observed

"In these circumstances it appears to me impossible to hold that the award is void and ineffective so as to invalidate the sale which followed it Even on the assumption that the sale was void, I fail to see how the respondents can rely on it for repudiating their liability to refund the excess amount which they received out of the purchase-money But for the sale they would not have got the money which they did Having received benefit from the sale can they repudiate the sale A party cannot approbate and reprobate, blow hot and cold in the same breath "[21]

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17 *Satish Chandra Nag* v *Silchar Co-op Town Bank Ltd*, A I R 1942 Cal 291

18 *Shreelal* v *Central Co-op Bank of Piparia*, (1936) N L J 6, 20 N L J 16 , A I R 1931 Pat 321; A I R 1934 Mad 181 , and A I R 1925 Cal 203 Rel on

19 *Narain Sakharam* v *Co-op Central Bank*, A I R 1938 Nag 434 , Ref *Lingengowda* v *Basangowda*, I L R (1927) 51 Bom 450

20 A I R 1943 Nag 7 , See also *Shri Jang Bahadur Chaube* v *Collector, Jaunpur*, (1957) All L J. 849

21 *See* supra note at 20 , *Subbaramma* v *Chinnaswami*, A I R 1935 Mad 295 , See also *Ambu Nair* v *Kelu Nair*, L R 60 I A 266 65 M L J 103 I L R 56 Mad 737 A I R 1933 P C 167 in which their Lordships of the Privy Council explained the principle as follows

Execution of an award held time-barred—Second award on the same matter—Whether valid.—As has been stated in the beginning, the policy of the Co-operative law is to save the members from protracted, expensive and sometimes ruinous litigation of the civil Courts. At the same time these special enactments should be strictly construed. Where the executing Court, which had full jurisdiction to decide the matter, formally held that the amount under the award had been fully satisfied and no appeal was filed and the order was allowed to become final, the party cannot obtain a second award on the ground that the amount which the parties agreed to forego has not been realised.[22] Once the dispute has been settled it is not open to a society to take further action in the matter by having recourse to the Registrar and the subsequent arbitration proceedings. In **Anjuman Dehi v Kehar Singh**[23], the execution of an award settling the dispute between the society and its members was held by the executing Court as time-barred and the society again referred the same dispute to arbitration and obtained an award. It was held that the dispute between the society and its member was determined by the first award and the subsequent dispute referred by the society to arbitration was one which could only be decided by the executing Court for it related wholly to the discharge of the award. It was further held that the second award was one which could not be passed and a suit could lie to have it declared void.

Death before award—Execution cannot take place.—Where the co-operative society obtained an award against a person, who had already died, the legal representative against whom the society wanted to execute the award, raised an objection that the award was a nullity in as much as the defendant had died before the award was made. Bhide, J., accepted this contention and held that an award granted under the Co-operative Societies Act is to be executed in the same manner as a decree of the civil Court and consequently on the death of a person, an award granted after such death must be treated as nullity.[24]

Award against insolvent cannot be enforced by executing Court.—A member of the society can claim before the executing Court that the award, decision or order passed against him cannot be executed, in view of the fact that he has been finally discharged by the competent Court. In **Molar v Co-operative Society, Sambhalka**[25], the petitioner was adjudged insolvent and was finally discharged by the insolvency Court. About two years later the liquidator made an order directing the petitioner to contribute to the assets of the society. In the execution proceedings, the petitioner pleaded that he has been finally discharged by the insolvency Court. It was held that any liability arising from a provable debt disappeared when the order of discharge was made. Even if the liquidator was competent to make an order against the petitioner and the liability could not be challenged by the executing Court on the ground that it was an order not made by a competent Court, it could not be executed, as by the force of the statute the liability has disappeared.

Execution and res judicata.—Once a decision has been taken by the executing Court, and no appeal has been taken and if any appeal has been taken it has

" It is a well acceptable principle that a party cannot both approbate and reprobate. He cannot to use the words of Honeyman, J., (1873) L.R. 8 C.P. 350, *Smith* v *Baker* at the same time blow hot and cold. He cannot say at one time that the transaction is valid and thereby obtain some advantage to which he could only be entitled on the footing that it is valid and at another say it is void for the purpose of securing some further advantage."

22. *Hira Nand* v *Anjuman Bank*, A.I.R. 1935 Lah. 631.

23. A.I.R. 1936 Lah. 901, Rel. on A.I.R. 1932 Lah. 53.

24. *Mt Gulab Bano* v *Anjuman Imad Bahami Qarza*, A.I.R. 1937 Lah. 63, Rel. on *Anwarul Haq* v *Nazar Abbas*, A.I.R. 1925 Lah. 494 and *Radhakrishan Sohanlal* v *Biharilal Asanand*, A.I.R. 1935 Lah. 439.

25. A.I.R. 1941 Lah. 315, Rel. on. A.I.R. 1940 Lah. 304, Not approved A.I.R. 1940 Lah. 280, Disting. A.I.R. 1940 Cal. 162, A.I.R. 1931 Rang. 252, A.I.R. 1939 Lah. 275 and A.I.R. 1940 Lah. 370.

finally decided, it shall operate as **res judicata** in a similar subsequent proceedings. In **Jagadeo v. Co-operative Society, Mahalungi**[1], the application for execution was dismissed on account of the failure of the applicant to pay process-fee. On the second occasion the application for execution was time-barred, but no reason was assigned by the executing Court for its statement On the third occasion the opposite party raised a question of **res judicata.** The Court rejected this contention Sen, J., observed

"There has been no decision by the executing Court on the merits of the controversy raised by the judgment-debtor. Section 11 of Civil Procedure Code has no application nor can the rule of **res judicata** be called in aid."

Where 'A' was a member of a co-operative society and in respect of a debt due from the society to the Central Co-operative Bank an award was passed in favour of the Bank for recovering the debt from 'A' as member of the society, it was held by the Revenue Court that the claim of the Bank was barred by limitation. Subsequently the society obtained a mortgage award in respect of mortgage executed by 'A' in its favour 'A' contended that the previous award would operate as **res judicata.** It was held that as the previous award was with reference to a totally different debt and the liability of 'A' was a different kind of liability the decision in the previous award could not operate as '**res judicata**' in the proceedings in respect of the subsequent award.[2]

Where a previous award has been given, if there remained a dispute as to the judgment-debtor's ability to pay, or the manner of enforcement of payment, the Registrar would be competent to deal with the matter and to make a second or a subsequent award in respect of the same dispute Section 11 of Civil Procedure Code has no application to such dispute The second award can, however, be obtained and executed only if there is an outstanding claim or debt due Therefore, where the debt has been completely extinguished the Registrar will have no power to make a second award.[3]

Executing Court cannot refuse to execute the award, decision or order—Appeal lies against such refusal.—A Court executing an award, decision or order under the Co-operative Societies Act, has no power to do anything except to execute the award, etc , as if it were a decree of the executing Court [4] In **Ahmad Yar** v **Co-operative Credit Society**[5], an award was filed in the civil Court, which refused to execute it on the ground that it was a nullity On appeal the District Judge held that the executing Court had no power except to execute the award as if it were a decree of the Court The High Court upheld the decision and held that an order refusing to execute an award under the Co-operative Societies Act holding that it was a nullity is appealable.

Where a liquidator passed an order directing the members to pay the debts of the society and the executing Court refused to execute the same, it was held that the civil Court had no option but to enforce the order passed by the liquidator.[6]

Court which can execute the award, decision or order, can transfer it for execution.—The executing Court can transfer the award, decision or order for execution to another Court and the transferee Court can execute the award, etc In **Krishnaji Shridhar** v **Mahadeo Sakharam**[7], an award was made by an arbitrator appointed by the Registrar. As one of the opponents had gone to Bombay from Poona and

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1. A I R 1951 Nag 210.
2 *Chandersingh* v *Kamalpore Co-op Society*, 24 Pat 681 A I R 1946 Pat 150
3 *Dwarka Prasad* v *Traders' Co-op Bank Ltd*, (1940) 21 Pat L T 343
4 *Karachi Urban Co-op Bank* v *Sahibdin Aladin*, A I R 1940 Sind 147
5 A I R 1926 Lah 547 , See also A I R 1924 Cal 117
6 *Mathura Prasad* v *Sheobalak Ram*, (1917) 15 A L J 863 42 I C 968 I L.R. (1918) 40 All. 89.
7 A.I.R. 1932 Bom. 377.

resided there, the petitioner applied before the Poona Court for certificate of transferring the decree for execution to the Bombay Court. Macleod, C.J., held, "As the petitioner could apply to the Poona Court to execute the decree as if the Poona Court had passed it, and the next step would be that if the Poona Court could execute the decree, as if it had passed that decree, then it could transfer that decree under section 39, Civil Procedure Code."

Executing Court should appoint guardian of the minor before execution.—It would be unsafe to rely on the appointment of a guardian by the Registrar in the summary proceedings and to extend it to the execution proceedings in a civil Court which should by its very nature be governed by the Civil Procedure Code. As a matter of fact it would be just that whenever an executing Court is approached to carry out the order, award or decision and there is minor in the case, the execution judge should act under Order 32, Civil Procedure Code and appoint a proper person to protect the interests of the minor concerned.

Where a member of a co-operative society obtained loan from the society and died before repayment, the society referred the matter to the Registrar who referred that to the Arbitrator. The Registrar passed an order of payment of due debt. In the order the minor daughter of deceased member was shown to be represented by her mother as guardian. The society presented the order before the civil Court for execution. One house belonging to the deceased member and eleven houses in which she had one-third share were brought to sale. The sale was objected on the ground that no guardian was appointed to protect her interests in the Court, although she had a share in the property which had been auctioned. It was held that the sale which was the result of the proceedings would obviously be invalid and liable to be set aside.[8] In this case, Mir Ahmad, J., observed.

"We are of the opinion that the appointment of a guardian by the Registrar in a summary proceeding is not covered by sub-rule (5) of Order 32, rule 3, Civil Procedure Code and that Order 32, Civil Procedure Code read with section 141 of the Code makes it compulsory that guardians of the minors should be appointed by the execution judge before he starts executing a payment order of the Registrar."

Sale of movables or immovable property by the executing Court.—The executing Court may ultimately order sale of the movables of the judgment-debtor for recovering the due amount. If the executing Court has to take recourse to the sale of immovable property, the procedure of determining the status of the judgment-debtor, the proper conduct of the sale by taking out proper publications by sale proclamations, etc., is a mandatory provision. An auction sale itself requires a long procedure, and any illegality in publishing or conducting the sale may vitiate it. At an auction sale the purchaser, be it a decree-holder or a stranger purchases the right, title and interest of the judgment-debtors. The rule of **caveat emptor**, buyer be careful should be borne in mind by the purchaser.

The three important rules relating to the setting aside of sale are rules 89, 90 and 91 under Order 21, Civil Procedure Code. The first deals with setting aside sales at the instance of the judgment-debtor, if he pays up all the decretal dues with a poundage of 5% to the auction-purchaser. The second deals with the petition that could be filed by the judgment-debtor to set aside the sale on the ground of material irregularity or fraud in the conduct of the sale. The third deals with the petition that can be filed by the auction-purchaser for setting aside the sale if he discovers that the judgment-debtor has no interest in the property sold. The limitation for filing of an application is 30 days from the date of sale in all the three cases. The orders passed by the executing Court are subject to an appeal by virtue

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8 *Muhammad Ashraf Khan* v. *Noor-un-Nissa*, A.I.R. 1945 Pesh. 39.

of the provisions under Order 43 of Civil Procedure Code. Only one appeal is provided [9-10]

If there be no application under any of the said rules, or if the Court does not grant the application in case it is made, the sale is confirmed from the date of sale. The purchaser can then take steps for a sale certificate by production of a proper stamp The next step that the auction-purchaser or the judgment-creditor if he happens to be one, has to take is to obtain the possession of the property purchased. The Court will render the necessary assistance to him for putting him in possession of the same If he gets possession there is an end of the matter and the decree stands satisfied But cases arise where the auction-purchaser may not have a smooth sailing, but may face an objection or obstruction The Court enquires into the same and if it overrules it, it is well and good for the auction-purchaser. If the same is upheld, the only course open for the auction-purchaser is to file a suit [9-10]

Sale pending proceedings—Rule of lis pendens—Where the award is passed and such award is put before the civil Court for execution and the Court directs sale of the mortgaged property, any purchase during such proceedings falls under the rule of **lis pendens.** In **Velayuda** v **Co-operative Rural Credit Society**[11], a member mortgaged his properties to the society and subsequently defaulted in paying the money The society obtained an award from the Registrar In the execution proceedings the properties were sold and the society purchased the hypotheca Plaintiff, who purchased the properties subsequent to the filing of the execution petition wanted to redeem the properties The main question at issue was whether his purchase was **pendente lite** or not It was held that the Registrar of Co-operative Societies acting under the Act was a Court Hence a transfer of property pending such proceedings was made **pendente lite.**

Execution of award, decision or order before the civil Court and period of limitation.—A question may arise whether the executing Court while executing the award, decision or order under the Co-operative Societies Act shall be governed by the Code of Civil Procedure and the Limitation Act The words 'in the same manner as a decree of such Court' make all the provisions of the Civil Procedure Code and the Limitation Act, applicable to the execution by a civil Court on the certificate of the Registrar under the Co-operative Societies Act The application to enforce or execute the certificate is necessarily an application under the Civil Procedure Code and must, therefore, be governed by the Limitation Act An application of a purchaser at a sale in execution of the certificate for delivery of possession is consequently governed by Article 129 of the Limitation Act, 1963 (Article 167 of the Limitation Act, 1908) and the right to apply accrues from the date of confirmation of the sale It cannot be held that there is no time-limit for an application for delivery of possession.[12]

There has been an attempt to canvass that an award not being a decree of the civil Court, the enforcement of the same would be governed by Article 181 of the old Limitation Act, 1908 and not by Article 182 or 183 which specifically provide for executions In **Belvedere Jute Mills Ltd.** v **Hardwari Mull & Co.**[13], an award under the Arbitration Act was sought to be enforced. Section 15 of that Act provided that the award when filed in a Court becomes enforceable 'as if it were a

9-10 *See* supra note at 1

11 (1934) 66 M L J 90 I L R 57 Mad 426 A I R 1934 Mad 40, *Thadi Subbi Reddi* v *Emperor*, (1930) 59 M L J 292 A I R 1930 Mad 869, foll

12 (1949) 2 M L J 682 I L R (1950) Mad 692 (1949) M W N 727, I L R (1940) Mad 649 (1940) 1 M L J 268 A I R 1940 Mad 635.

13 A I R 1927 Cal 853 See also *Shreenivassa Murthy* v *Shri Vyasarajendra Co-op Bank*, A I R 1954 Mys 54 I L R (1954) Mys 288, *Kasan Co-op Society* v *H S Suryanarayanappa*, A I R 1952 Mys 127 and *Jayashamarajendra Co-op Society* v. *Madaiah*, A I R. 1951 Mys. 9.

decree of the Court'. Dealing with the question as to which of the two Articles applies, Article 181 or the specific Article 182 or 183 dealing with the execution petitions, Rankin, C J, observed

"If one looks at the question of limitation from the point of view of different alternatives, there could be one inference only and that is that the words employed by the legislature in sub-section (1) of section 15, Arbitration Act, were intended to go into the question of limitation as well as the question of procedure"

The above Calcutta case was followed by both the Madras and Bombay High Courts. In a Madras case[14], Leach, C.J, observed

"If it attracts the provision of the Code with regard to execution, it must, in our opinion of necessity attract the provisions of the Limitation Act which apply to the execution of decrees."

In a Bombay case[15], Rajadhyakashya and Gajendragadkar, JJ., observed:

"It seems to us that the legislature clearly intended that an award made under section 54 of the Act should be executed in the same manner as a decree passed by the civil Court The manner of execution to which reference is made in section 59 (1) (a) would, we think, attract the application of the relevant provisions of the Code of Civil Procedure as much as those of the Limitation Act."

By the new Limitation Act, 1963, the procedure for execution of the decree of civil Courts has been made simpler by bringing all decrees on a par with decrees of the Chartered High Courts, by providing that the period of limitation for execution of a decree or order shall be 12 years from the date of decree or order The original requirement under Article 182 of the old Act in respect of decrees other than those of the Chartered High Courts, being kept alive by taking steps in aid, has been given a goby in the new Limitation Act, 1963 with the result that the only period prescribed for execution under Art 136 is 12 years

Article 136 of the Limitation Act, 1963 contemplates only a decree or order made in such form so as to render it capable of being enforced in execution, if a further application is necessary to make the decree executable or enforceable, then Article 137 (old Article 181) applies to such a further application[16], which has laid down three years as period of limitation. In order to determine the applicability of the relevant Article it is necessary to ascertain whether the legal requirements of a given Article are applicable to a given case or not [17] An application for the amendment of a decree will now be governed by Article 137 and not by Article 136. Where the execution application was not in accordance with law and the Court required the decree-holder to amend it and returned the same for amendment but the decree-holder presented the amended petition after the time prescribed by the Court, it was rejected as it was presented beyond time and it was held that the order of rejection was a final order [18] The execution application may be filed thus within twelve or three years as the case may be, from the date of the order, decision or award The date of award should be regarded as date on which it is officially communicated to the persons affected thereby In **Lakshmi Narayan Kolley v. Lalit Mohan**[19], the award given by the Registrar was communicated to the persons affect-

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14 *S V Subba Rao* v *Calicut Co-op Urban Bank Ltd*, I L R (1940) Mad 649 (1940) 1 M L J 268 A I R 1940 Mad 635

15 *Bhim Sen* v *Urban Bank*, A I R 1947 Bom 370

16 *Rameshwar Singh* v *Homeshwar*, 40 M L J 1 L R 48 I A 17 A I R 1921 P C 31

17 *Rungiah Goundan & Co* v *Nanjappa Row*, (1903) 13 M L J 412 I L R (1903) 26 Mad 780.

18 *Viryala Perraju* v *Pillai Achanna*, A I R 1964 A P 152

19 A I R 1941 Cal 152, *Sreenath Chatterjee* v *Kylash Chunder*, ('74) 21 W R 248 and *Dutto Singh* v *Dosad Bahadur*, I L R (1883) 9 Cal 575, Rel on

In *Shimoga Co-op Bank Ltd* v *Veena Putta Jois*, (1943) 21 Mys L J 38, it was held that the starting point of limitation is the date of certificate See also *City Co-op Bank Ltd*, *Mysore* v *Narasimhaiah*, (1939) 44 Mys H C R 528. (1939) 17 Mys L J 470

ed after three years The society should have applied for execution within three years of the date of the award Actually they instituted execution proceedings within three years from the date the award was communicated to them. A question arose whether the date of the award should be deemed to be the date of the decision of the arbitrator or the date on which such decision was communicated to the party concerned. It was held, "In such a case the date of the award does not mean the date written therein, but the time when it is handed over to the parties, so that they may be able to give effect to it In this view of the case the date of award should be regarded as the date on which such award is officially communicated to the person or persons affected thereby."

Where the application for execution of the award was pending before the Collector and that was returned after some period to the judgment-creditor, another application to execute the award was made to a civil Court after the expiry of the limitation period prescribed for civil Court A question arose whether the period during which the application was pending before the Collector would be excluded for limitation purposes or not It was held that there was nothing in the Co-operative Societies Act to indicate that the Collector was deemed to be a Court, and since it was not a Court the application presented to the civil Court was barred by time as it was not made within time as required.[20] Cornish, J., observed:

"Reference may be made to the analogous provisions of sections 68 and 71 Civil Procedure Code which enable a decree to be transmitted to a Collector for execution Section 71 says that in such matter the Collector shall be deemed to act judicially. But it has been held in **Bhagwandas** v **Suraj Pd.**[21], that this does not mean that the Collector is a Court. I follow this authority "

A petition to the Collector for the enforcement of the award is not a step-in-aid for saving limitation for a subsequent execution petition in the civil Court.[22]

II. Execution by the Revenue Court.—The judgment-creditor if he prefers to follow the course prescribed by the State Land Revenue Act, has to step into the arena of the Revenue Court. The procedure prescribed under the above Act for recovery of the land revenue is compartively simpler than that of the Code of Civil Procedure The amount due under any award, decision or order under the Co-operative Societies Act, could be recovered as arrears of land revenue and be executed according to the provisions of the Land Revenue Act

Any application for the recovery of the amount shall be made to the Collector of the district and shall be accompanied by a certificate signed by the Registrar or by any person authorised by him in this behalf. Such application must be made within twelve years from the date fixed in the order, decision or award and if no such date is fixed, from the date of the order, decision or award, as the case may be.

The procedure prescribed under the Rajasthan Land Revenue Act, 1956, for recovery of land revenue under section 228 of that Act, is by one or more of the following processes:

(a) by serving a writ of demand or a citation to appear on any of the defaulters,

(b) by attachment and sale of his movable property,

(c) by attachment of the specific area, share, patti, or estate, in respect of which the arrear is due;

(d) by transfer of such share or patti to a solvent co-sharer;

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20 *Abdul Razack* v *Kilapatti Co-op Society*, 70 M L J 31 I L R 59 Mad 257 A I R 1936 Mad 150

21 I L R (1925) 47 All 217

22. (1938) 40 Bom L R 889

(e) by sale of such specific area or patti or of the whole estate;

(f) by sale of other immovable property of the defaulter.

Sale without attachment of property—Prior sale protected.—Every award, decision or order has the force and effect of a decree and they are enforced in the same manner as a decree on an application being made to a civil Court having jurisdiction If no application is made to the civil Court, then the Collector can only proceed on such application as he would in the case of an arrear of land revenue In such event he cannot sell without previous attachment unless there is a first charge on the estate. In **Nirandgarh Simaria Co-operative Society v. Binaivati**[23], a member of the society mortgaged his one-third share in the village to the society and obtained a loan That was a simple mortgage with a provision for sale and for personal liability if the sale clause proved infructuous wholly or partly The money was not paid and so the society obtained an award from the Registrar The Society then put an application before the Deputy Commissioner for recovery as arrears of land revenue Before any action was taken by the Revenue Authorities, the member sold some part of the mortgaged property to the plaintiff. The property was subsequently attached and sold by the Revenue Authorities. The plaintiff-purchaser claimed that the action of the society and the Revenue Authority in selling the property was wrongful. It was held that any one who purchases before such attachment is protected. If there was no charge, the property could not be sold if it had already been attached In the absence of such attachment, the prior purchaser has a prior claim.

Sale subject to encumbrances.—In a sale held by the Revenue Authorities in execution of an award made by the Registrar, the property is not sold free of encumbrances. The fact that there is no mention in the sale proclamation of any encumbrance on the property sold is no ground for holding that the property must be deemed to be sold free from encumbrances. A Co-operative Society is under no legal obligation to notify a mortgage, and the purchaser is subject to prior encumbrances [24]

Sale of land not specified in the award.—An award made by the Arbitrator provided that the defaulter shall pay to the society a certain sum by a fixed date and in default, the society was to recover the money by execution of the mortgaged lands mentioned in the list enclosed therein In execution the Collector sold not only the mortgaged property but also another property not included in the mortgage security, though belonging to the defaulter The sale of the latter item was challenged on the ground that not having been included in the mortgage or the award, the Collector had no jurisdiction to sell the same It was held that the Collector who had power to execute the award according to law in force for the recovery of arrears of land revenue, was at perfect liberty, after exhausting the mortgaged properties, to proceed to recover the balance due from the defendant as though he was recovering arrears of land revenue and could under section 155 of the Bombay Land Revenue Code, cause the right, title and interest of the debtor in any immovable property other than the mortgaged property to be sold for the debt, and therefore, the sale of the non-mortgaged property was not **ultra vires** or void on that account [25]

Creditor cannot realise amount directly from member.—'A' who was a member of a co-operative society, approached the society for a loan The society requested another 'Mandal' (Society) which advanced money to 'A' through the society When the amount was not paid by 'A', the Mandal referred the matter to the Registrar, who appointed an arbitrator to decide the dispute The arbitrator held that the dispute between Mandal and non-member could not be decided

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23 A I R 1945 Nag 281, *Ghasi Ram* v *Mst Kundanbai*, A I.R 1940 Nag 163 Ref

24 *Kasireddi Sidareddi* v *Mandapalle Co-op Society*, (1940) 1 M.L J 121 A.I R. 1940 Mad 452 : (1940) M W N 487

25 *Ramakrishna Vaman* v *Narayan Vaman*, A I R 1951 Bom 267 : 52 Bom L R 834.

by him. The Mandal then claimed the amount from the society and this dispute was referred to arbitrator, who held that the Mandal could realise the amount from the society and passed an award in favour of the Mandal The appellant was not a party to this award After obtaining the award the Mandal moved the Collector to realise as land revenue The Collector ordered the attachment of the property of the appellant In a writ petition the appellant prayed for a writ of **mandamus** and prohibition requiring the Collector not to take any action under the award. It was held that no liability could be created by an award against a person who was not a party to it, nor could a creditor of the society proceed directly against the member for the realisation of his debts due from the society.[1] If any member really owes money to the society, the amount so owed can certainly be considered to be included in the assets of the society The creditor of the society can, therefore, proceed against this asset also for the realisation of his money. The amount so owed by the members of the society to it will stand on the footing of an actionable claim An actionable claim can be attached and sold The amount which it fetches at the sale can be taken by the creditor The purchaser at the sale will then have to enforce the liability of the member in any proper proceedings and the member in that proceedings will be entitled to challenge the claim against him and to show that no amount is really due from him Without affording this opportunity to the member, the creditor of the society cannot obviously be allowed to realise any amount from the member by means of coercive processes simply because the society alleges that the member owes the amount to it.

Arrest of person for recovery is illegal and ultra vires **the Constitution.**—It may be seen that in the different kinds of processes prescribed under the Land Revenue Act, the Collector has not been authorised to recover the arrear by arrest and imprisonment of the defaulter Any such action shall be illegal and **ultra vires** the Constitution In **Mohammad Hussain Ansari** v **Banaras State Carpet Weavers' Co-operative Union**[2], the petitioner was a shareholder of a co-operative society He acted as Managing Director for a short interval of about eight months. On his resignation he was succeeded by another person who had certain controversy with the petitioner. The society demanded a certain sum which was due from the petitioner. The matter was referred to arbitration by the Registrar. While the reference was pending the society went into liquidation The liquidator sent a requisition to the Registrar, who in turn sent to the Collector for recovery as arrears of land revenue The Tahsildar after issuing a notice, issued a warrant of arrest The petitioner was arrested and after one day he was released after furnishing security In a writ petition the petitioner prayed for quashing of the entire proceedings including the warrant of arrest on the simple ground that they were unauthorised by law. While delivering the judgment, Dhavan, J., observed·

"Article 21 of the Constitution provides that no person shall be deprived of his life or personal liberty except according to the procedure established by law. The sole question before this Court is whether, on the material placed before it in the form of affidavits and the depositions of the two liquidators, the respondents have established their case that the arrest of the petitioner was lawful and according to procedure established by law I have come to the conclusion that the arrest of the petitioner was illegal and not authorised by the Co-operative Societies Act or any other law "

Reference to arbitration not valid—Money cannot be recovered by the Collector.—The Registrar has power to refer the dispute touching the constitution, management or business of a co-operative society arising between society and its member, past member, etc , to the arbitration If such reference was illegal and

1. *Shri Jang Bahadur Chaube* v. *Collector, Janpur*, (1957) All L J 849.
2. A.I.R. 1959 All. 733 The principle laid down in A.I.R. 1928 All. 128 has now no validity.

thereafter the Collector has started to recover money under that award, a question may arise whether the Collector could recover such money as arrears of land revenue. In **Sriram Autar v. District Co-operative Sugarcane Supply Society, Ltd.**[3], the appellant was the independent payment contractor, and according to the contract he worked as payment contractor for about four months and during that period a huge sum became due by the appellant. The dispute between the appellant and the society, was referred to arbitration. The society tried to realise the amount of the award through the Collector as arrears of land revenue. In a civil suit the appellant contended that he was neither a member nor an Officer of the society and that no consent was taken before referring the matter to arbitration. The reference being **ab initio** invalid, further proceedings before the Collector were invalid. The Court accepted this contention and held that even though the appellant went to arbitration under a mistaken belief that he was an Officer, the arbitration proceedings did not bind him at all, because he was not in law an officer as defined by the Act and was not subject to compulsory statutory arbitration. In such a case it will obviously not be a statutory arbitration and so the provisions of the Co-operative Societies Act and the rules shutting out an approach to the civil Court under the Arbitration Act would not apply, nor would any decision given on appeal, which was purported to have been made under the provisions of the Act be binding or conclusive.

Where the award given by the Registrar was not objected by the judgment-debtor, and was sent to the Collector for execution, who sold the fields of the judgment-debtor, such sale could not be challenged later on as being void.[4] The principle of section 73 of Civil Procedure Code is not applicable to a sale by the Collector and the sale proceeds in the hands of the Collector are not liable to attachment at the instance of other creditors of the person whose land is sold.[5]

III. Execution by the Registrar.—The judgment-creditor, if he chooses to follow the course laid down in clause (c) of sub-section (1) of section 118 of the Rajasthan Co-operative Societies Act, 1965 or in similar provisions of other States' Acts, he must apply to the Registrar or any other person subordinate to and empowered by the Registrar in this behalf, to execute the order, decision or award obtained by him. The Registrar has power to execute the order by either of the following processes.

(1) By the attachment and sale of movable or immovable property of the judgment-debtor, or

(2) By the sale without attachment of movable or immovable property of the judgment-debtor.

The Registrar shall have a power to work as a civil Court for purposes of Article 136 of the Limitation Act, 1963. For purposes of the attachment of property the Registrar shall follow more or less similar procedure as laid down for the civil Court.

The Registrar acting under this clause cannot be treated as a Court within the meaning of section 39 of the Civil Procedure Code and a decree-holder applying to the Registrar to recover money payable under a decree of a civil Court need not get a transfer of the decree to the Registrar. The proceedings taken by the Registrar under this clause may be of the same nature and may have the same result but they are not execution proceedings in a civil Court governed by the Civil Procedure Code.[6]

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3. A.I.R. 1960 All. 500.

4. *Co-op. Central Bank v. Narayan Ramjee*, A.I.R. 1943 Nag. 7.

5. *Khudabadi Amil Co-op. Credit Bank Ltd. v. Hyderabad Amil Co-op. Bank*, A.I.R. 1938 Sind 157.

6. *Mahomed Amin Sahib v. Tiruvannamalai Co-op. Society*, (1949) M.W.N. 727 : (1949) 2 M.L.J. 682 : I.L.R. (1950) Mad. 692 : A.I.R. 1950 Mad. 234.

It is not open to a person to challenge such sale in the civil Court. Therefore, a suit for declaration that the sale is void and not binding on the plaintiff and other creditors is barred by the provisions of the Co-operative Societies Act.[7]

Where in execution of a decree obtained by a Co-operative Society, the properties of the judgment-debtor were sold and there was a re-sale consequent upon the default of the first purchaser resulting in deficiency of price, it was held that the Deputy Registrar could direct that the sum deposited by the first purchaser be treated as money realised at the sale of the judgment-debtor's property and be set-off against the sum due from the judgment-debtor to the society.[8]

In case there is a total violation of the provisions of this Act and the Rules made thereunder, the civil Court has jurisdiction to entertain a suit. Thus where in a purported act of attachment of movable property by the Officers of a Co-operative Society from a pawn-broker in execution of an award, there had been flagrant breach of rules, in that no order of the Deputy Registrar was obtained nor was it produced or shown to the person in possession of the movable property and instead of directing him not to deliver the property to the defaulter, the property was actually seized from his custody and handed over to the Secretary, it was held that there was total violation of the procedure laid down by the rules and that not merely that the act was done without obtaining any authority from a competent person but also the property was in fact seized by acts, akin to those of trespassers, verging on the brink of criminality[9] In this case the Court observed:

"It is clear from the above observations that the ouster of the jurisdiction of the civil Court cannot be readily assumed and even if the jurisdiction is excluded in cases where there is non-compliance with the fundamental principles of the statute or a failure to observe the fundamental principles in relation to the procedure that may tend to make the proceedings illegal and void, the person aggrieved can seek remedy in civil Courts "

Private transfer, etc., against the society shall be void.—It is the duty of the judgment-creditor to apply for the certificate of the Registrar. After such certificate is issued, it is the duty of the judgment-debtor not to transfer privately by way of lease, gift, mortgage sale, charge or any other encumbrance any property under dispute If any party has transferred such property, it shall be null and void as against the society on whose application the said certificate was issued.

Concluding remarks.—The civil and revenue Courts were allies of the Co-operative Department in the matter of execution of awards, decrees, orders or decisions. But recovery of co-operative dues through them was not very encouraging. 9
In the Madras Co-operative Societies Act, 1932, section 57-B authorised the Registrar or person empowered by him to be a civil Court for the recovery of any amount by the attachment and sale or by the sale without attachment of any property The Registrar was thus entitled under that section to execute the decree without the aid of the civil Court. But in other State Acts there was no such provision. The Committee on Co-operative Law appointed by the Government of India, framed clause 96 of the Model Bill on the lines of the provisions of the Madras Act. It enables such moneys to be recovered departmentally. For recovery of sums due under a charge like a Co-operative loan, clause 95 of the Bill empowered the Registrar to make an order on the application of a Co-operative Society straightaway after due inquiry which can be executed like any other order

7. *K Satyanarayana* v *Motu Industries*, (1963) 1 An W R 323

8 *Chandragiri Loan & Sale Co-op Society* v *Nalli Changa Reddi*, (1958) Andh L T 1147 : A I R. (1959) Andh Pra 288

9. *Kakinada Co-op Urban Bank* v *Chunnilal Firm*, (1965) 1 An W.R. 233· A I R 1966 Andh. Pra 240 , Rel on *Secretary of State* v *Make & Co* , L R 67 I A, 222 (1939-40) F L J (P C) 15 : I L R. (1940) Mad. 599 (1940) 2 M L J 140 A I R 1940 P C 105 and *Firm Illusic Subbayya Chetty & Sons* v *State of Andhra Pradesh*, (1963) 50 I T R 93 · (1963) 2 S.C J 725 : (1964) 1 M L J. (S.C) 5 : (1964) 1 An.W R. (S C) 5 · A I R. 1964 S C. 322.

or decree. This remedy is in addition to remedies already available through the Civil or Revenue Courts. In order to prevent the ends of justice being defeated by disposal or removal of property before judgment is pronounced, clause 98 makes provision for its attachment before judgment These important recommendations of the Co-operative Law Committee were accepted by most of the State Governments. Section 118 (1) (c) of the Rajasthan Co-operative Societies Act, 1965 provides that the order shall be executed by the Registrar by attachment and sale or sale without attachment Section 120 of this Act declared the Registrar to be a civil Court for such purposes. Some of the States have still not incorporated such provisions and there execution is only through civil and revenue Courts. As I have noted above execution through civil Courts had delayed the matter and the recovery of the co-operative dues was very much affected. Co-operative is not a panacea, yet the element of mutual aid which it supplies is really indispensable But its progress would be marred if effective executino machinery is not provided The execution of orders, etc , through Registrar would help in speedy disposal of cases In conclusion, it is submitted that there is a need to utilise this departmental procedure, in as large number as possible, by the judgment-creditor societies Secondly, where the State Governments have not incorporated such provisions, there is a need for such incorporation